

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

OCTOBER TERM, 1939

558

No. 7543

UNITED STATES OF AMERICA, APPELLANT

vs.

ELLA TYLER WITBECK, BENEFICIARY OF ALBERT
TYLER WITBECK, DECEASED

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

FILED NOVEMBER 1. 1939

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

OCTOBER TERM, 1939

No. 7543

UNITED STATES OF AMERICA, APPELLANT

vs.

ELLA TYLER WITBECK, BENEFICIARY OF ALBERT
TYLER WITBECK, DECEASED, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Caption.....	A	1
Declaration.....	1	1
Defendant's plea to plaintiff's declaration.....	5	4
Verdict.....	7	5
Motion to set aside verdict and judgment, &c.....	8	6
Final judgment.....	10	7
Notice of appeal.....	12	8
Transcript of proceedings—Volume 1.....	13	9
Transcript of proceedings—Volume 2.....	116	68
Transcript of proceedings—Volume 3.....	164	97
Transcript of proceedings—Volume 4.....	219	129
Order authorizing the forwarding of depositions, &c.....	243	135
Statement of points.....	244	135
Order as to extension of time.....	247	137
Order extending time for the filing of record, &c.....	248	137
Stipulation as to record.....	250	138
Clerk's certificate.....	253	141
Deposition of—		
Judge W. C. Barnette.....	257	141
Dr. Willis P. Butler.....	274	151
Lucy C. Mathews.....	300	165

	Original	Print
Marguerite Carlton Blane.....	315	173
Ella C. Levy.....	318	174
Carrie M. Henry.....	329	181
Dr. J. M. Gorton.....	351	187
E. Wayles Browne.....	373	200
F. E. Lacaze.....	391	209
R. O. Roy.....	396	212
John E. Heard.....	407	217
Agreement to take deposition.....	459	237
Appearances.....	461	238
Testimony of Mrs. John Marshall.....	461	238
Stipulation.....	462	239
Testimony of Dr. W. S. Kerlin.....	463	239

A DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

Law No. 88796

SEYMOUR VAN OS, ADMINISTRATOR OF THE ESTATE OF ALBERT
TYLER WITBECK, DECEASED, AND
ELLA TYLER WITBECK, BENEFICIARY OF ALBERT TYLER WITBECK,
DECEASED, PLAINTIFFS

VS.

UNITED STATES OF AMERICA, DEFENDANT

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration*

Filed April 15, 1937

In the District Court of the United States for the District of
Columbia

Law No. 88796

SEYMOUR VAN OS, ADMINISTRATOR OF THE ESTATE OF ALBERT
TYLER WITBECK, DECEASED, SHREVEPORT, LOUISIANA, AND ELLA
TYLER WITBECK, BENEFICIARY OF ALBERT TYLER WITBECK,
DECEASED, 560 2ND AVENUE, NORTH, TROY, NEW YORK,
PLAINTIFFS

VS.

UNITED STATES OF AMERICA, DEFENDANT

The plaintiffs, Seymour Van Os, as administrator of the estate of Albert Tyler Witbeck, and Ella Tyler Witbeck, as beneficiary of the United States Government Life (Converted) insurance contracts of Albert Tyler Witbeck, sue the defendant, the United States of America, for that heretofore, to wit, under the provisions of Section 310, World War Veterans' Act, 1924, as amended, the defendant issued to Albert Tyler Witbeck, hereafter called the

insured, two \$5,000.00 United States Government Life (Converted) insurance contracts, one effective August 1, 1924, bearing K number 455,927, and the other effective June 1, 1925, bearing K number 488,958, in which plaintiff, Ella Tyler Witbeck, mother of the insured, was named beneficiary; that under the terms of said contracts of insurance the defendant, for and in consideration of the monthly premiums to be paid by the insured, which premiums were duly paid by the insured, undertook, agreed, and contracted with the insured that in the event he became totally and permanently disabled within the meaning of said contracts while the same were in full force and effect, to pay him monthly installments of insurance at the rate of \$5.75 per thousand dollars of insurance commencing with the onset of such total and permanent disability, which continued so long as the insured should live, or if the insured should die before receiving 240 of said installments of insurance then the defendant agreed to pay to the estate of said insured installments accruing from date of total and permanent disability to date of death and to pay the remaining unpaid insurance to the named beneficiary in one sum; and while said policies were in full force and effect, the insured having paid premiums due and payable thereafter and having performed fully his part of said contract, was totally and permanently disabled within the meaning of the definition of said total and permanent disability as defined in said contract, to wit, the term "Total Permanent Disability" as covered by said contract is: "any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person", while said insurance was in full force and effect, to wit, on to wit, September 1, 1932, the insured became and was totally and permanently disabled within the meaning of said contract; and the insured died while suffering from said total and permanent disability on, to wit, December 1, 1933; and by reason of said total and permanent disability it became and was the duty and obligation of the defendant, the United States of America, to pay to Seymour Van Os, administrator, the aforesaid monthly installments of \$57.50 of insurance from date of total and permanent disability, to wit, September 1, 1932, to date of death of the insured, to wit, December 1, 1933; and likewise it became and was the duty of the defendant, the United States of America, to pay to plaintiff, Ella Tyler Witbeck, beneficiary of said insurance, the remaining unpaid installments in one sum.

That on, to wit, April 23, 1936, Ella Tyler Witbeck, beneficiary, filed claim alleging permanent and total disability, which claim was duly denied by the defendant on, to wit, February 10, 1937, and a disagreement now exists between plaintiff and defendant with respect to said insurance, vesting in this Court authority to hear and determine the issues created by virtue of said disagreement. Defendant had due proof of said disability on, to wit, April 23, 1936.

Wherefore, plaintiff, Seymour Van Os, as administrator of the estate of Albert Tyler Witbeck, brings this suit and claims of the defendant monthly installments of \$57.50 beginning September 1, 1932, and continuing to the date of death of said insured, which occurred on, to wit, December 1, 1933, and asks that of the sum for which judgment is given ten percent thereof shall be deducted therefrom and paid to plaintiff's attorney as attorney's fees herein;

Wherefore, plaintiff, Ella Tyler Witbeck, beneficiary of said insurance, brings this suit and claims of the defendant the remaining unpaid insurance due at date of death of the insured on, to wit, December 1, 1933, and asks that of the sum for which judgment is given that 10% thereof shall be deducted therefrom and paid to plaintiff's attorney as attorney's fees, and should plaintiff elect to receive such insurance benefits in monthly installments as prescribed by the contract, then plaintiff asks that upon all monthly payments accrued on and after the date of judgment herein, there shall be deducted from and paid to said attorney a further allowance as attorney's fees.

(Signed) SEYMOUR VAN OS,
Plaintiff.

(Signed) WARREN B. MILLER,
Attorney for plaintiffs.

STATE OF _____,
COUNTY OF _____.

I do solemnly swear that I have read the foregoing declaration by me subscribed and know the contents thereof; that the matters therein stated of my personal knowledge are true, and those matters stated upon information and belief I believe to be true.

(Signed) SEYMOUR VAN OS,
*Administrator of the Estate of
Albert Tyler Witbeck, deceased.*

4 Subscribed and sworn to before me this 31st day of
March, A. D., 1937.

[SEAL] (Signed) MARION K. SMITH,
Notary Public.

My commission for life in Louisiana.

STATE OF _____,
COUNTY OF _____.

I do solemnly swear that I have read the foregoing declaration by me subscribed and know the contents thereof; that the matters therein stated of my personal knowledge are true; and those matters stated upon information and belief I believe to be true.

(Signed) ELLA TYLER WITBECK,
Beneficiary of Albert Tyler Witbeck, deceased.

Subscribed and sworn to before me this 6th day of April, A. D., 1937.

[SEAL]

(Signed) FREDA C. FILLEY,
Notary Public,
Rensselaer Co., N. Y.

My commission expires March 30, 1938.

5 *Defendant's plea to plaintiff's declaration*

Filed September 17, 1938

* * * * *

Now comes the defendant, the United States of America, by its attorney, David A. Pine, United States Attorney in and for the District of Columbia, and for a plea to the Declaration filed herein says:

Defendant denies that the deceased insured herein was insured under two (2) Five Thousand Dollars (\$5,000.00) United States Government Life (Converted) Insurance Contracts, numbers K-455,927 and K-488,958, sued upon herein; defendant avers that the premiums on the original contract of War Risk Term insurance in the amount of Ten Thousand Dollars (\$10,000.00) issued to the deceased insured, were paid to include July, 1924, and that, effective August 1, 1924, the deceased insured converted Five Thousand Dollars (\$5,000.00) Term insurance to an Ordinary Life Policy (K-455,927) on which premiums were paid to include February, 1932; extended insurance under this policy, amounting to Four Thousand, Three Hundred Fifty-nine Dollars, Thirty Cents (\$4,359.30) expired January 13, 1933; premiums on the Five Thousand Dollars (\$5,000.00) Term insurance which was not converted in August, 1924, were paid to include May, 1925; effective June 1, 1925, said Term Insurance was converted to an ordinary Life policy (K-488,958) on which premiums were paid to include May, 1932; extended insurance under this policy, amounting to Four Thousand, Three Hundred Eighty-one Dollars, Ninety-three Cents (\$4,381.93) expired February 20, 1933.

6 And for a further plea to the said Declaration, defendant says:

Defendant denies that the deceased insured herein became and was totally and permanently disabled on September 1, 1932, as alleged, or that it became or was its duty and obligation to pay the plaintiffs the sums claimed in the said Declaration, or any other sum or sums whatsoever, on account of any alleged total and permanent disability; defendant further denies that the plaintiffs have furnished to the defendant due proof of the alleged total and permanent disability, or that said due proof was in its hands on the 23rd day of April, 1926; defendant denies that the administrator of the estate of Albert Tyler Witbeck is entitled to monthly installments beginning September 1, 1932, and continuing to the date of death of said insured;

And for a further plea to the said Declaration, defendant says:

Defendant avers that the question of a reasonable attorney's fee is determinable by the Court under the provisions of Section 500 of the World War Veterans Act of 1924, as amended.

DAVID A. PINE,
A. C.

United States Attorney.

7

Verdict

Filed March 31, 1939

* * * * *

This cause having come on for hearing on the 28th day of March, 1939, before the Court and a jury of good and lawful persons of this district, to wit: Joseph R. Meinberg, Earl C. Putnam, G. Elbert Robertson, Walter C. Propps, Herman Pressman, Samuel O. Peek, Harry E. Grier, Morris S. Greenfield, Wilbur H. O'Dell, William Jaeger, George R. Hecht, Luetta H. Palmer, who, after having been duly sworn to well and truly try the issues between Seymour Van Os, Admr. and Ella Tyler Witbeck, Beneficiary, plaintiffs, and United States of America, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 31st day of March, 1939, that they find the issues aforesaid in favor of the plaintiff.

CHARLES E. STEWART,
Clerk.

By C. B. COFLIN,

Asst. clk.
By direction Letts, J.

8 *Motion to set aside verdict and judgment, or, in the*
 alternative, grant a new trial

Filed April 4, 1939

* * * * * * *

Comes the defendant, the United States of America, by David A. Pine, United States Attorney, and moves the Court to set aside the jury verdict in favor of the plaintiff, and that judgment in favor of the defendant be entered, and in the alternative, that the verdict of the jury be set aside and a new trial granted, and assigns as grounds for such motion, the following:

I

That the defendant was and is entitled under the law and evidence of the case to a directed verdict.

II

That the Court was in error in permitting the testimony of Dr. Butler with reference to statements made to him by other persons and Dr. Young on the ground that all such statements were hearsay evidence and the opinion of Dr. Butler was clearly based on such hearsay evidence.

III

That the Court was in error in refusing the requested Prayer Number 2 of defendant, because, under the evidence of this case, there could not have been any permanent and total disability of insured as based upon any other condition than that of mental incompetency.

9

IV

The Court was in error in charging the jury that they could return a verdict for plaintiff upon a basis of some nervous or mental condition which was not incompetency.

V

The overwhelming weight of the testimony was in favor of the defendant and the jury simply ignored the facts and law to find a verdict in favor of the plaintiff.

VI

The testimony of witnesses for plaintiff as to the mental condition of the insured was not of sufficient weight and materiality to justify submission to the jury, since all of such testimony, except that which was hearsay, shows the opinions of witnesses as formed on insufficient opportunities and facts of such immateriality as not to allow any real opinions on their part.

VII

That in the hurry of preparing for the trial, the defendant was unable to have all of its available testimony to present, or use in the trial, and upon a new trial, will, no doubt, be in position to add materially to the defense of this case.

VIII

The verdict of the jury is so contra to the law and facts of the case as to be shocking to the justice thereof.

DAVID A. PINE,
United States Attorney.

10

Final judgment

Filed June 29, 1939

* * * * *

This cause came on for trial before the Court and a jury, and it appearing that United States Government Life Insurance contracts numbered K-455,927 and K-488,958 issued to Albert Tyler Witbeck in the amounts of \$4,359.30 and \$4,381.93, respectively, were in full force and effect through January 13, 1933, and the insured, Albert Tyler Witbeck died on December 1, 1933, and Seymour Van Os is the duly acting qualified and appointed administrator of the estate of Albert Tyler Witbeck; and after consideration of the evidence, the case having been submitted to the jury, and a verdict having been returned in favor of the plaintiff finding the insured to have been totally and permanently disabled on January 13, 1933, and a motion for new trial having been filed by the defendant, and after argument and consideration thereof by the Court, it is this 27th day of June, 1939,

Ordered and adjudged that defendant's motion for new trial be and the same is hereby overruled and it is further

Ordered and adjudged that the insured, Albert Tyler Witbeck, became and was totally and permanently disabled on January 13, 1933, and that due proof of such disability was submitted to the defendant on April 23, 1936, it is further

Ordered and adjudged that the plaintiff, Seymour Van Os, Administrator of the estate of Albert Tyler Witbeck, take nothing by this action; and that the plaintiff, Ella Tyler Witbeck, do have and recover from the defendant, United States of
11 America, Eight Thousand Seven Hundred Forty-one Dollars and Twenty-three cents (\$8,741.23), and it is further

Ordered and adjudged that Warren E. Miller, attorney for plaintiffs, is entitled to recover as a reasonable attorney's fee ten per centum (10%) of the sum for which judgment is given, said ten per centum to be deducted from the amount paid under the judgment and paid to plaintiffs' attorney as attorney's fees herein, which is hereby allowed.

F. DICKENSON LETTS,
Justice.

Approved as to form:

WARREN E. MILLER,

Attorney for Plaintiffs.

ALLEN CRENSHAW,

Attorney, Department of Justice.

DAVID A. PINE,

A. C.

United States Attorney,

Attorneys for Defendant.

12

Notice of appeal

Filed July 19, 1939

* * * * *

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the District Court of Appeals in and for the District of Columbia from the final judgment entered by the United States Court in and for the District of Columbia in this action on the 29th day of June, 1939.

This the 19th day of July, 1939.

DAVID A. PINE,

A. C.

*United States Attorney in and for the District of Columbia,
Attorney for Appellant, the United States of America.*

13

Transcript of proceedings—Volume 1

Filed November 1, 1939

* * * * *

WASHINGTON, D. C.,
Monday, March 28, 1939.

The above-entitled cause came on for trial before Associate Justice F. Dickinson Letts in Civil Court Number 1 at 10:00 o'clock a. m.

Appearances: On behalf of Plaintiffs: Warren E. Miller. On behalf of Defendant: Colonel Allen Crenshaw, James B. Costello, George M. Fay.

PROCEEDINGS

20

OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

By Mr. Warren E. Miller

Mr. MILLER. If your Honor please, and ladies and gentlemen of the jury: In this case, we will show that during the life of the insured Mr. Witbeck applied for and was granted a contract—in fact, two contracts—of Government insurance in the amounts of \$5,000 each. These policies were maintained in full force and effect, one, through the month of January, 1933, and the other one, I believe, through the month of May, 1933.

Mr. Witbeck died in December, 1933. His beneficiary is the plaintiff in this case and is his mother.

We will show that Mr. Witbeck, because of certain things that will develop in the course of the testimony as to his mental and physical condition, was unable to continuously follow any substantially gainful occupation for some considerable period prior to the time these insurance contracts ceased to be in force.

We will show from the testimony of persons who had
21 an opportunity to observe him—that is, his neighbors, his friends, his relatives, and medical testimony, that he was suffering from some mental affliction; that because of this it was impossible for him to continuously follow any substantially gainful occupation.

We will show that he was a man of education—was an engineer by profession, a civil engineer—but, as the years went on, in the latter years of his life, he continually went down so far as his health was concerned, and that his condition reached that condition of total and permanent disability at some considerable time prior to the lapse of these insurance contracts.

I would like to say that Mr. Witbeck lived in Louisiana most of the period of time we are going to cover; namely, 1932 and 1933, and for the years previous to that; that he lived there for a number of years, a large number of years. He had a home there; his wife was with him and he had a boy.

We will show you what occurred. We will show you because of his peculiar mental condition that it was impossible for his wife to continue living with him. We will show you that they separated; that his boy continued to stay with him part of the time and part of the time stayed with the plaintiff. We will show that he was not only what would be classified as peculiar, mentally, but we will show that he had a serious permanent mental affliction. While that is no reflection on Mr. Witbeck, it is just the condition of the mind of the deceased that existed that made it impossible for him to continue to work as a normal man would, and that his condition meets the requirements
22 of these insurance contracts upon which this suit has been predicated.

We will show from the testimony of those people who had an opportunity to observe him, and also the testimony brought out on cross-examination of witnesses produced by the Government here, the defendant in this case, that this man was suffering from a peculiar condition, a mental condition. People would not hire him if they had work to do. He was the type of man they would not have around.

After we tell you these things, we will ask for a verdict at your hands.

OPENING STATEMENT ON BEHALF OF THE DEFENDANT

By Mr. James B. Costello

Mr. COSTELLO. Members of the jury, for the purpose of the record, the Government will admit that this suit was filed on April 15, 1937; that a claim for insurance benefits was first filed on December 9, 1933, with an additional claim being filed by the beneficiary on 4/23/36, with the denial thereof that insurance claims were cancelled on 2/10/37.

The COURT. Were those claims separate as to these two policies?

Mr. COSTELLO. There was a claim on both policies, your Honor. As to the insurance here, the Government admits that the insured, while in the military service, applied for and was granted a \$10,000 war-risk term insurance effective 11/13/17, in which he designated his wife as beneficiary. Premiums were paid to in-

clude July, 1924, effective 8/1/24. He converted \$5,000 of the \$10,000 term to an ordinary life policy and premiums were
23 paid to include February, 1932. The loan was cancelled under extended insurance, in the amount of \$4,359.30, which expired 1/13/33. The beneficiary on this converted policy was Ella Tyler Witbeck, the mother. He converted the remaining \$5,000 term insurance to include May, 1925, effective 6/1/25, to an ordinary life policy on which premiums were paid to include May, 1932.

Loan cancelled under extended insurance in the amount of \$4,381.93, expired 2/20/33. The beneficiary under this policy was also the mother, Ella Tyler Witbeck.

The Government also admits that the deceased insured entered the military service on July 27, 1917, and was discharged on February 20, 1919.

The defendant further denies that the administrator of the estate of Albert Tyler Witbeck is entitled to monthly installments as claimed in the declaration from September 3rd, 1932, to the date of death, which was some time in December, 1933.

Members of the jury, the Government will show you at this time that the deceased veteran, after he was discharged from the military service, returned home, entered vocational training at the expense of the Government, and was rehabilitated as a logger. The man was a civil engineer and, after his discharge from the military service, he worked for the Standard Oil Company and the Atlas Oil Company, and his salary from the date of discharge practically up to the date of his death varied anywhere from two hundred to six hundred dollars a month, and some years he drew as high as ten thousand dollars a year. In addition to being an expert oil-well man, his services were sought by all oil
24 companies in Louisiana and Texas, and he was also an expert in architecture and likewise an expert in civil engineering. In addition to that, we find this man, within a very short period of time, a man who is supposed to be permanently and totally disabled, testifying in one of the largest lawsuits in Louisiana in which the side he was testifying for as an expert obtained a verdict.

In addition, the Government will show you testimony from two of his personal friends, two doctors, one his family doctor, who was intimately associated with him in the various American Legion posts, and the testimony of those doctors you will be able to test for yourselves.

Ladies and gentlemen of the jury, in this particular case, we find this man paying his premiums on one of these five thousand

dollar policies up to about January, and the other one up to about February, 1932. He died in December, 1933. His policies lapsed, one in January and the other one in May. In December, 1933, he died as a result of an appendicitis operation. He dropped his policies. We find in this case he was divorced in 1928 and that perhaps there was no further need for this protection. You gentlemen know that if you have a fire insurance policy in the house and the policy lapses, and five or six months later you have a fire you are out of luck.

His wife secured a divorce from him and he, perhaps, had a little mental disturbance at that time. After his death they resurrect this trouble he had with his wife to show that he may have been—or, at least they say he was—mentally incompetent. This man, gentlemen of the jury, was also a lawyer, well versed in particular fields. This man was considered one of the most
25 brilliant engineers of the southeast and southwest. After the production of all this testimony the Government will expect a verdict.

The COURT. It will be the duty of the jurors to avoid any and all conversation about this case throughout the progress of the trial and until it is finally submitted to you for your consideration. At that time you will go to your jury room and will be privileged to discuss the matter fully, but until that is so, there must be no conversation with any persons whomsoever. This means, of course, you shall not have any conversation with anyone on the outside; also, you must not talk it over among yourselves. The jury may be at ease for about five minutes.

EVIDENCE ON BEHALF OF THE PLAINTIFF

Thereupon ELLA TYLER WITBECK, the plaintiff, was called as a witness in her own behalf, and having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. MILLER:

Q. Will you state your name, age, and occupation, please?

A. Ella Tyler Witbeck. I am 78 years old this coming May. I was born in 1861, and I have no trade. I am a widow.

Q. You are the mother of Albert Tyler Witbeck, the insured?

A. Yes, sir.

Q. And the designated beneficiary of his insurance?

A. Yes.

Q. You are the plaintiff in this case?

A. Yes.

Q. Mrs. Witbeck, where do you live?

A. 560 Second Avenue, North Troy, New York.

Q. Where did your son live prior to his death?

A. I didn't catch that.

Q. Where did your son live prior to his death?

A. On College Avenue. I think it was, in Shreveport, Louisiana.

Q. Just before he lived on College Avenue, where did he live?

27 A. 1610 Crosswell Street, Shreveport, Louisiana.

Q. How long did he live on Crosswell Street?

A. Well, the boy was born—they went there right after they were married, I think. He is now 22 years old, I think it is.

Q. That would be about 23 or 24 years ago they moved to Crosswell Street?

A. Yes.

Q. About when was it that you last saw the insured, Albert Tyler Witbeck?

A. I think it was in July. He was with me for a month in July, 1931.

Q. He visited you for a month in Troy?

A. Just a month, yes.

Q. Did you have his boy?

A. I had his boy and he came after him.

Q. He took the boy back with him?

A. Yes.

Q. What do you remember now about your son's condition—that is, the insured's condition when he visited you the last time in that month of July or August, 1931?

A. I noticed that he began to act rather queer. He didn't act like himself. He was always neat. At that time he didn't care whether he was clean or whether he had clean linen on or not.

At night he would write fifteen letters at one time and tear them up, and he would foam all over. On the telephone, he would call different ones and then he would hang up before he would get an answer. Then he would get a book and start to
28 read and the first thing I know he would throw the book and start in to write again. It was in the room, right at my sleeping room, and I would get up and I saw him writing. I thought then he acted strange. I could not say insane. It is hard for a mother to say that.

Q. Just continue the best you can. What other little things do you personally remember about your son's condition back there in July or August, 1931?

A. He took us riding one time and he went on Petersburg mountain where you could not pass in an auto and he stopped and said we might just as well stay here.

The COURT. I want the reporter to read that answer.

The REPORTER (reading):

"Answer. He took us riding one time and he went on Petersburg mountain where you could not pass in an auto and he stopped and said we might just as well stay here."

By Mr. MILLER:

Q. What occurred then at that time and place?

A. I asked him—I told him—I said, "You go on." It was getting dark and we had to drive so long afterwards before we got to the clearing. The woods was right up on each side. Then we got out. He seemed all right for a while. It seemed that it came and went.

Q. What do you remember about the way he acted or drove a car?

A. He would drive fast sometimes and sometimes would be on one side of the road and sometimes on the other, kind of zigzag, and then he would go along all right again.

Q. You mentioned in using the telephone he would foam, where would he call? Whom would he call, if you know?

A. As to that, I didn't know. He tried to call New Orleans one night and Oneida and tried to get Florida. When he would get a person it was kind of nonsensical talk that he would give. You could not give much to it.

Q. During that month he was there do you remember how much your telephone bill was?

A. About \$16.00.

Q. Would there be other things that you would notice about him that was different from the last month, from the way he looked, acted, and appeared before that?

A. Well, just that he wasn't right. But I laid it to nervousness because he wasn't working and about the boy, I rather think he was jealous. He took good care of the boy and when he came to me, I didn't know he was coming. He telegraphed to a friend of mine to meet him in Albany at such a train. I think I had him for about two years and I was appointed guardian, because I could not afford to send him to school. I had to be appointed his guardian in order not to pay.

Q. What do you recall about your son's actions at the table during that time?

A. I don't know that he was any different.

Q. Who was living with you then when your son came up there?

A. I was living alone then.

Q. Do you recall anything else about his actions there that were different from what they used to be when you saw him before?

30 A. No, only that whenever he would go out with the car he always wanted to go on dirt roads. He never wanted to go on state roads and in narrow, dangerous places.

Q. Was he easily excitable?

A. That, I could not say, but he was always good to me in his way, always, whatever he could, because he knew that my income was small and he wanted me to have comfort because I was alone.

Q. Mrs. Witbeck, would there be people coming in to see you when your son would be there?

A. The lady that lived on the first floor.

Q. What do you recall about the circumstances that occurred then?

A. She came upstairs and remained one time. I don't know whether the door was open to let the dog in or not, but he stayed in his underclothes right there. He didn't seem to mind at all whether she was there and she was almost a perfect stranger to him.

Q. Was he friendly toward the dog?

A. Yes, in a way, only that the dog had been brought up alone with me, a police dog, and when I would eat, the dog would sit right beside of me and whatever I would eat I give him some. He came on this side and Albert was sitting there. He said, "Get away from there," and the dog got up and went on the other side. He said, "Get away from there."

He took his coffee and threw it at the dog and, of course, the dog resented the hot coffee and ten minutes after he was petting him.

Q. The things you mentioned were different from before?

31 A. Yes.

Q. When did you see him before 1931?

A. It was in 1930 he came up and he seemed more rational then.

Mr. MILLER. That is all.

Cross-examination by Colonel CRENSHAW:

Q. How long had you lived in Troy, New York?

A. I was born and brought up there.

Q. And he lived there as a young man and went to Louisiana?

A. That is, after I was married I went to Lansburg to live. That is a suburb of Troy.

Q. You never did live in Shreveport?

A. No; but I visited there twice.

Q. When was it you visited there?

A. When the boy was a baby.

Q. Did you visit him down there after the World War?

A. No; I think it was before.

Q. I mean your son. Did you visit your son after the World War?

A. No; I didn't.

Q. The only time you saw him was when he went to Troy to visit you after the World War?

A. After he came from overseas he stopped on his way to see me, but he only stayed a couple of hours and then he went on to the camp. That was before he was discharged. He had a leave of absence.

Q. After that, how long was it before you saw him?

32 A. It was in 1930, I think.

Q. How long did you see him in 1930?

A. Only just a short time. He came really to see the boy, and then he came the next year again and he came after him, because he said they were going to arrest him for kidnaping the boy.

Q. That is what he told you?

A. He said they were going to arrest him for kidnaping the boy.

Q. The only two times you saw him after the short two-hour visit was in 1930 when he came up for just a short time, and again in 1931?

A. He was there for just the four weeks.

Q. Four weeks in 1931?

A. Yes.

Q. His son, your grandson, was then living with you up to that time?

A. I think he was twelve years old when they sent him to me, and he stayed with me. I think his father came for him in 1931.

Q. That was after your son had gotten a divorce from his wife in 1928; is that right about the time, or 1929?

A. I didn't catch that.

Q. Right after the divorce in 1928 or 1929, his son, your grandson, went to live with you in Troy, New York?

A. Yes.

Q. Did your grandson live with you all the time until his father came and got him in 1931 and took him home?

A. Yes.

33 Q. Did his son stay in Shreveport after that with him?

A. Yes, but he lost his home down there. He went to 1610 Crosswell Street and he lost his home.

Q. Did his son go back and live with his father, your son, until he died?

A. No, I didn't have him with me. He took him home and then I didn't see him again until I got word that he died, that my son was dead. Then I got his body.

Q. In other words, his son lived down there with his father, who is your son, Albert Witbeck, from 1931, when he came up to get him in Troy until your son died?

A. Yes.

Q. After he died your grandson came to live with you?

A. He was there for a while and then he went back with his mother.

Q. He lived part of the time with his mother and part of the time with you?

A. They were separated for a long time before I knew it.

Q. When was the first time that you noticed anything different about your son?

A. In 1931, the last time.

Q. You had not noticed anything before that?

A. I thought he was tired when he first came from driving.

Q. He drove the car?

A. He drove the car and I think he drove over four hundred miles.

34 Q. That was his car, was it?

A. Yes; but the car was in my name.

Q. I mean, when he came from Shreveport up to your house, he drove the car from Shreveport to New York?

A. Yes.

Q. You say that car was in your name?

A. Yes.

Q. He bought it in Shreveport?

A. I think he did.

Q. But bought it in your name?

A. Yes.

Q. He had had it before some two or three years?

A. I think so.

Q. Although he bought the car in your name he kept it and used it?

A. He kept it and used it and had it a long while before I knew anything about the car.

Q. The first you knew about it was when he went to get his son?

A. Yes.

Q. And he drove it from Shreveport up there?

A. Yes.

Q. Then he stayed there for four weeks?

A. Yes.

Q. Then he took his son in the car and drove back to Shreveport?

A. Yes.

Q. And he kept the car down there, so far as you know?

A. Finally, he lost the car. It wasn't paid for.

35 Q. How do you know that, Mrs. Witbeck? How do you know he lost the car, or whether it wasn't paid for?

A. Well, he had been in a wreck with the car.

Q. I mean, how do you know anything about that?

Mr. MILLER. She is telling that.

The WITNESS. The car was new and he had sent the check from the insurance company, I believe it was, up to me for me to sign, and it was in such a way that I didn't understand it. So, I went to the bank and saw the president of the bank and asked him how I should sign it. It was made out to the automobile firm in Shreveport. All of the name I can remember is Bates and Chrum, something like that, and the president told me to put my name down there close to the firm's name.

Q. You signed the check for the damage done to the automobile?

A. I had to sign it after the president signed it for me.

Q. You sent that back to your son?

A. I got that letter on Friday morning.

Q. Whom did you get it from?

A. Yes; Friday morning. I didn't know that he was in the hospital and Saturday morning I got the two telegrams; one, that he was operated on for appendicitis, and the other one he was gone. That was the very next day.

Q. In other words, he was in the hospital just a few days?

A. Only a few days. I believe, from Tuesday and he passed out Friday night.

Q. Of the same week?

36 A. Of the same week.

Q. And you were informed it was an operation for appendicitis?

A. Yes.

Q. That was long about December, 1933?

A. 1933 he died, December 1, 1933.

Q. You never had noticed anything different about your son until July, 1931?

A. No, because I hadn't seen nothing of him to notice.

Q. Was there anything wrong with his physical condition at any time you noticed him?

A. I didn't catch that.

Q. Was there anything wrong with his physical condition at any time you noticed him?

A. Not that I noticed. I was so pleased to know that he had come home that I couldn't see everything.

Q. This is your signature right there, Mrs. Witbeck, isn't it?

A. Yes.

Q. Look at that and see if that is a statement you made on June 13, 1936 [handing paper to witness].

A. That is my attorney there. That is my signature; yes.

Q. I notice your son died on December 1, 1933.

A. Yes.

Q. You said in this statement here from July 4, 1928—that was the date of the death of Albert Witbeck—he was incapacitated from earning his own living; he wasn't capable to support himself, is that right?

A. Yes.

Q. You didn't know anything about his condition except what somebody told you?

A. Yes; not having him with me.

Q. Except those two visits, that is all you knew about it?

A. Yes. He would write once in a while and said business was getting better but hadn't struck him yet, because he used to send me money at times, because I couldn't live on the income I had.

Q. Beginning along in 1929 or 1930, along that time, he wrote you about the depression in the business and that he couldn't get work to do on account of the depression?

A. Yes.

Q. At that time he quit sending you money?

A. Yes.

Q. Did he send you any more at all before he died?

A. It was some little time before. He sent me the last time \$15.00. He says this is all I can send now.

Q. Do you remember about when that was?

A. No; I don't know.

Q. Was it as much as a month, two months, or six months?

A. It might have been, but I couldn't swear.

Q. Was it more than a year?

A. I don't know, I couldn't say.

Q. Give us the best of your judgment about it. Did he send you that check during the last year of his life?

38 A. I think he did.

Q. He wrote you a letter about it?

A. The last letter I got is the one——

Q. (Interposing). The one he sent you \$15.00?

A. No; the one I got was when he was in the hospital after he had been operated on. It was this check to the automobile firm.

Q. Before that, he sent you a check for \$15.00 and wrote you and told you that was all he could send you at that time?

A. He sent me the money. He never sent me a check in an envelope.

Q. In July, 1928, he visited you in the city of Troy, New York? Was he up there in July first, 1928?

A. I could not say.

Q. You don't recall that?

A. No; I can't.

Q. The only ones you do recall are 1930 and 1931?

A. That is right.

Q. You don't remember this one? You say your attorney in New York drew this up for you?

A. Yes.

Q. Do you remember anything about your son being ill up there?

A. No; I don't.

Q. Do you mean your grandson?

A. Yes.

Q. Was your grandson up there in July, 1928?

A. I don't know.

39 Q. That was before the divorce, wasn't it? He had not come up there until after they were divorced; is that right?

A. The boy came up after that.

Q. And not before?

A. No; not before. His mother visited me with him when my son went overseas.

Q. You did not notice on any of these visits that your son, Albert, was actually sick, but your grandson was sick?

A. Yes; he was sick twice.

Q. But your son, so far as you know, wasn't sick up there?

A. Albert would keep everything from me.

Q. That is, your son?

A. My son.

Q. He was solicitous? He did not want to worry you?

A. He would keep all of his troubles away from me so far as he could. Yes; he was a good boy.

Q. He loved his mother, looked after her, and was kind and generous to her?

A. All he could after his father passed away.

Q. Every letter you had from his spoke of his love?

A. Yes.

Q. He never did act unnatural?

A. No; he always seemed kind and thoughtful.

Q. Even on the last trip he made up there in 1931 he was kind, thoughtful, and considerate?

A. To me he was.

Q. He was never domineering, or anything like that, with you. I mean?

A. Not that I noticed. Sometimes he would say things.
40 I felt he was nervous and I would let them pass.

Q. He was a very brilliant man, was he not?

A. I think so.

Q. Intellectually, he was a very strong-minded man?

A. Yes; he was.

Q. He was educated and trained, and considered an expert in his business, was he not?

A. Yes.

Q. He had been a very great success in his business, had he not?

A. Up to the time of the depression.

Q. I mean the business depression in 1929, you remember that?

A. Yes.

Q. He was working for himself at that time, was he not?

A. Yes, sir.

Q. In the oil fields in Texas and Louisiana?

A. Albert kept everything from me that he possibly could.

Q. Did he ever advise you about the business conditions down there getting bad?

A. He could not get as much work as he had before. He said he could not get as much work.

Q. Then you knew from him there was a business depression which badly interfered with his business along in 1929, and after that; that is correct?

A. Yes, sir.

Q. That was when he stopped sending you money, was it?

41 A. The year he passed away, it was along—well, I might say in the summer time that that last money came.

Q. That must have been in 1933, was it not?

A. Yes; he knew that it was hard for me to get along without it, and he would worry.

Q. In 1932, the year before that, the year after he went up there and took his son home with him, did he send you some money?

A. Yes.

Q. How often would he send you money like that?

A. Whenever he had it to send, whenever he could raise the money. I thought he was working. I don't know whether he borrowed it or earned it.

Q. But you do know he sent you some money at regular intervals?

A. Once in a while.

Q. Just occasionally?

A. It was occasionally. It wasn't every month, it wasn't every week, whenever he could.

Q. Sometimes two or three months?

A. Yes, sir.

Q. About how much would he usually send you?

A. It was different. Sometimes it would be \$5.00, and sometimes it would be \$10.00, maybe \$25.00. Just whatever he had.

Q. That went on all those years up to the time before he died?

A. Yes.

Q. The year before he died he just sent you one check; is that correct?

42 A. He might have sent me some more, but I don't remember. But I remember that \$15.00 was the last.

Q. In July, 1931, when he was up there, you rode about the countryside with him in the car. You talked to him on many occasions and he talked intelligently?

A. Sometimes. In this ride through the woods I noticed that he acted strange. In the woods, at that time, when he looked back at me and the boy, I had my arm around him in the back seat of the car and he turned around and he looked at me. I thought his eyes looked queer, and he said, "We might just as well stay here."

I said, "You go on."

Q. Did he say for how long?

A. No; after he got ready he went on.

Q. It was a few minutes?

A. After a few minutes. He had to drive straight because he could not go either side. It was like a bank on each side with woods.

Q. It was a narrow road?

A. A narrow, dirt road in Petersburg mountain.

Q. It must be a beautiful place.

A. It wasn't to me that night.

Q. It was dark?

A. It was almost dark. When we got out of the clearing I says, "Thank God he carried us safely through."

Q. He drove it all right through the woods?

A. Yes.

Q. And took you back home?

A. Yes.

43 Q. That was all you noticed?

A. Then he would have these spells.

Q. Do you mean about writing a lot of letters?

A. Yes; and took this book to read, and the first thing I would know he would throw the book on the floor.

Q. He was a very ardent reader, was he not? He read a great deal?

A. Yes.

Q. He wrote a lot, too, did he not? You knew about that?

A. I didn't know as to that, I couldn't say.

Q. Don't you know he wrote articles for magazines?

A. All I know about that was the obituary notice that I had taken out of the paper.

Q. Did you ever see any of his articles that he had written for magazines?

A. No, sir.

Q. Did you ever hear him say anything about those to you at all?

A. No; he kept those things to himself.

Q. You just do not know he actually did write a lot of articles and things of that sort?

A. No; I could not say.

Q. I believe we had gone into the question that you knew he ran into a business depression in 1929 and his work was not so much as it had been before. He got this divorce from his wife or his wife divorced him in 1928 or 1929?

A. Yes.

44 Q. You knew, of course, he was very much disturbed over that happening?

A. I think so.

Q. That disturbed him greatly—the fact that his wife divorced him?

A. Yes.

Q. The fact that his son left him and had to leave home—all of that disturbed your son?

A. Yes.

Q. He wrote you about all that, did he not?

A. Well, it was a long while after they separated before I knew they were separated.

Q. He kept that from you?

A. He kept that from me, and then he wrote home. He said, "I am sorry that May has left."

Q. That was some time after they separated?

A. Yes, it must have been six months.

Q. You knew from the way he let you know about it that he was trying to save you from worrying?

A. Yes.

Q. He deliberately kept that from you some time after his divorce?

A. He wanted to keep everything from me.

Colonel CRENSHAW. I am going to offer this for identification—that is, the statement which Mrs. Witbeck identified, dated June 13, 1936.

(The statement was marked "Defendant's Exhibit 1" for identification.)

By Colonel CRENSHAW:

45 Q. Did you know when Mr. Witbeck changed the beneficiary of his insurance?

A. No, but I got that letter at home. I thought I had brought it with me. I had another package that I picked up and brought along with me. He told me how he named me the beneficiary.

Q. That was after he had the divorce?

A. Yes.

Q. He wrote you and told you then he made a change in beneficiary?

A. Yes.

Q. And sent you some sort of paper?

A. Yes, I got the letter home where he told about that.

Q. Do you recognize his signature right there [indicating]?

A. That is his signature.

Q. That is the change of beneficiary to you, as his mother, dated May 22nd, 1929, was it not?

A. Yes.

Colonel CRENSHAW. We offer this paper for identification, if the Court please.

(The paper was marked "Defendant's Exhibit 2" for identification.)

The WITNESS. His bonus check was made out to me.

By Colonel CRENSHAW:

Q. Do you mean after he died?

A. Yes, he sent me a telegram.

Q. That was a retirement check, was it not?

A. I don't know what you call it.

Q. That is the one from the Government. Did you know
46 he was drawing retirement pay from the Government?

How much was the check for that you got after his death?

A. Five hundred and something. He had borrowed on this and it had brought it down to five hundred.

Q. That was his bonus certificate? He made you beneficiary for that?

A. Yes, for that too.

Q. And that was paid to you?

A. Yes.

Q. That was paid after he died?

A. That was paid after he died. He told me at that time he made that over to me as well as the policies.

Q. Was there another check that was paid to you after his death for retirement benefits?

A. No, not after he drew this, I think it was \$165 per month, I don't know just the exact amount.

Q. You knew he was getting some amount from the Government?

A. Yes, but he never told me the amount. I think it was cut off altogether and finally was reinstated for \$22.50 a month.

Q. You remember up until March, 1933, when a new veteran's bill was passed by Congress that it was after that that he was cut off for the retirement pay?

A. No, I don't.

Q. It was your understanding that up until some time he was drawing some sort of pension compensation, about \$165 a month; is that right?

A. Yes.

47 Q. He drew that for several years?

A. I don't know about the several years.

Q. For how long did he get checks from the Government while he was up there?

A. They were mailed to him and that is all I know.

Q. Is that your signature there?

A. Yes.

Q. This is your claim for your insurance benefits filed on April 16, 1936? I am just referring over here to the next page. It says, "What diseases or injuries to be permanently and totally disabled," and your answer was, "Mental, bronchitis, nose, throat, sinus, and abdominal."

"Abdominal" referred to what you knew about appendicitis?

A. Yes.

Q. The first thing you knew about that was when you had a telegram that he had an appendix operation?

A. I didn't have any notice until I got word that he was gone.

Q. Your notice, then, was that he was operated on Tuesday and died on Friday of the same week?

A. Yes.

Q. That was the only abdominal trouble you knew about?

A. My grandson sent me the two messages.

Q. What do you know about his sinus trouble?

A. I think he had that the last year he was there.

Q. He complained of some trouble in his nose?

A. Yes.

Q. Did he complain of some trouble in his throat?

A. Yes.

48 Q. And the bronchitis was causing that?

A. Yes.

Q. That is all you know about that?

A. Yes.

Q. The mental part you said there—what do you base that on? You have told us about this one instance that he was driving the car at that time in the woods in 1931, and you have told us about his writing and tearing up of his letters.

A. And raving around the house and wearing soiled linen. It wasn't right, because he was always very neat in his right mind, and would bathe and put clean linen on. I noticed then that he would sooner go without his clothes than he would to wear them, and that they would be dirty.

Q. In other words, he got careless?

A. He got careless and he looked queer at times. Then it was like this: he would be all right some times and then would not.

Q. Did he ever say or talk anything that was unintelligent?

A. Not to me, he didn't.

Q. Did you ever hear him say anything unintelligent?

A. Not to me.

Q. Do you know to whom he was writing those letters?

A. No, sir; he would tear them up.

Q. That was after his wife was divorced?

A. Oh, yes; I think that had a bearing too.

Q. Do you know when his wife remarried?

A. I think it was in September, 1933.

49 Q. In September 1933?

A. I think so. He only lived a short time.

Q. At the time he was up there and writing these letters and tearing them up and his wife had been divorced but neither one of them had been remarried, you do know he had loved his wife very dearly?

A. Yes.

Q. He had been most attentive to her?

A. He was up to the time.

Q. Of this divorce?

A. Yes.

Q. And it injured and hurt him very much when he got the divorce?

A. Yes.

Q. But you do not know whether he was writing letters to her?

A. No; I don't.

Q. Did he ever mention to you that he was trying to get her back?

A. Yes; he asked me to write a letter to her.

Q. That was in 1931?

A. He asked me to write a letter to her and ask her if she would not come back, which I did.

Q. Did you ever hear him say whether or not the letters he was writing and tearing up were letters he expected to mail to his ex-wife?

A. No, sir; I don't know who he wrote the letters to.

Q. He talked very sorrowfully about the divorce, and was very anxious to go back with her?

50 A. Yes.

Q. That is all you know about his mental condition—that is, what you told us?

A. Yes. He was domineering sometimes.

Q. He had always been a kind of strong-minded fellow, was he not? He was an officer in the Army?

A. Yes, captain.

Q. He always had charge of men working under him, even after the war? You knew that from what he said?

A. Yes.

Q. He had very definite ideas about most everything?

A. He thought he had.

Q. He was very strong in believing he was right?

A. Yes.

Q. He was a very honorable and high-class man, was he not?

A. I hope so.

Colonel CRENSHAW. I offer this claim for insurance benefits dated April 16, 1936, for identification.

(Claim for insurance benefits dated April 16, 1936, was marked "Defendant's Exhibit 3" for identification.)

Colonel CRENSHAW. As a part of that, your Honor, I just located a sheet attached to it for industrial history.

By Colonel CRENSHAW:

Q. Is that your son's signature right there?

A. Yes, sir.

Colonel CRENSHAW. It is dated July 6, 1928, and is an application for retirement pay. We offer that for identification.

51 (Application for retirement pay dated July 6, 1928, was marked "Defendant's Exhibit 4" for identification.)

By Colonel CRENSHAW:

Q. Is this your son's signature right there?

A. Yes, sir.

Colonel CRENSHAW. This is dated November 2, 1933, which is the claimant's appeal to the Administrator of Veterans' Affairs which has reference to his compensation. We offer that for identification.

(Claimant's appeal dated November 2, 1933, was marked "Defendant's Exhibit 5" for identification.)

By Colonel CRENSHAW:

Q. Is this your son's signature right there?

A. Yes, sir; he had a peculiar way of signing his name.

Q. There is no difficulty in identifying it, is there?

A. No, sir.

Colonel CRENSHAW. This is dated December 1, 1928, and is the employment statement by the claimant. We offer that for identification.

(Employment statement dated December 1, 1928, was marked "Defendant's Exhibit 6" for identification.)

By Colonel CRENSHAW:

Q. This is his signature here?

A. Yes, sir.

Q. And this one here?

A. Yes, sir.

52 Q. And this one here?

A. Yes, sir.

Q. And this one right here?

A. Yes, sir.

Q. And this one right here?

A. Yes, sir.

Q. And this one here?

A. Yes, sir.

Q. And this one here?

A. Yes, sir.

Q. And this one right here?

A. Yes, sir.

Q. And this one right here?

A. Yes, sir.

Q. And this one right here?

A. Yes, sir.

Q. And this one right here?

A. Yes, sir.

Q. And this one right here?

A. Yes, sir.

Q. And this one right here?

A. Yes, sir.

Q. And this one right here?

A. Yes, sir.

Colonel CRENSHAW. We offer these for identification. These are applications for reinstatement for insurance from June 28, 1927, up to April 27, 1932.

53 (Applications for reinstatement of insurance from June 28, 1927, up to April 27, 1932, were marked "Defendant's Exhibits 7 to 23," inclusive, for identification.)

By Colonel CRENSHAW:

Q. Mrs. Witbeck, do you remember who your son's family doctor had been in Shreveport?

A. I don't hear very well.

Q. Do you remember who his family doctor was in Shreveport?

A. Doctor Gordon, wasn't it?

Q. Doctor Gordon had been his doctor for some time. That is what your son told you?

A. I think so.

Q. Here are some more of his signatures here, Mrs. Witbeck. Can you identify them?

A. Yes.

Q. That is a letter dated May 27, 1933, from Shreveport, Louisiana, addressed to General Frank T. Hines, Administrator of Veterans' Affairs, signed Albert T. Witbeck. We offer this for identification.

(Letter dated May 27, 1933, was marked "Defendant's Exhibit 24," for identification.)

By Colonel CRENSHAW:

Q. This is his signature right here?

A. Yes, sir.

Q. It is dated March 2nd, 1925, and addressed to B. C. Moore, Veterans' Administration?

54 A. Yes, sir; I think I have copies of those letters home. Colonel CRENSHAW. We offer that for identification also.

(Letter dated March 2, 1925, was marked "Defendant's Exhibit 25," for identification.)

By Colonel CRENSHAW:

Q. Is that his signature right here?

A. Yes, sir.

Colonel CRENSHAW. This is dated February 7, 1930, and signed A. T. Witbeck. We offer that for identification.

(The paper referred to dated February 7, 1930, was marked "Defendant's Exhibit 26," for identification.)

By Colonel CRENSHAW:

Q. Does that look like his signature there?

A. That is printed, but it looks like his printing.

Q. Here is one. See if that is his signature. This is just a photostat.

A. Yes, sir; that is his.

Colonel CRENSHAW. We offer this for identification. It is a Civil Service application made by Albert Tyler Witbeck on September 26, 1933.

Mr. MILLER. No objection.

(Civil Service application dated September 26, 1933, was marked "Defendant's Exhibit 27," for identification.)

By Colonel CRENSHAW:

Q. Is that his signature right there?

A. Yes, sir.

Q. Look at this and see if this is his picture.

55 A. Yes, sir; don't you see he has a peculiar expression in his eyes?

Q. This is his picture right here?

A. Yes.

Q. May I use that?

A. Yes.

Colonel CRENSHAW. We offer that for identification.

(Picture was marked "Defendant's Exhibit No. 28" for identification.)

Colonel CRENSHAW. We also offer for identification Civil Service application dated May 1st, 1931.

(Civil Service application dated May 1, 1931, was marked "Defendant's Exhibit 29" for identification.)

By Colonel CRENSHAW:

Q. Mrs. Witbeck, do you recall just not so very long before he died that he wrote you about testifying in a big lawsuit in Shreveport and appearing as a witness?

A. I don't remember.

Q. You don't know anything about that?

A. No, sir; I don't remember.

Q. Did he tell you anything about any civil engineering jobs in oil-field work?

A. No; he kept everything from me that he possibly could.

Colonel CRENSHAW. All right, that is all.

Redirect examination by Mr. MILLER:

56 Q. Mrs. Witbeck, when was this picture taken, do you know?

A. Maybe the papers would show. They had that on the examination.

Q. Was this on the Civil Service report?

A. Yes; and it had a peculiar expression in the eyes, and perhaps I better bring that. He left it at home the time he was there, I guess the last time. It slipped out of a bag.

Colonel CRENSHAW. The record shows that this picture was taken out of Mrs. Witbeck's purse.

By Mr. MILLER:

Q. Mrs. Witbeck, as I recall, you said in answer to a question by Colonel Crenshaw that your son had definite ideas about everything. Just what do you mean by that?

A. If he would say a thing, it must be so. That is the only way I can interpret it.

Q. If someone disputed what he said, what occurred?

A. He would have his own way about it. He would not give in to it.

Q. In other words, his ideas were fixed?

A. Yes.

Q. Do you recall any complaints he made about his condition when he was up there with you?

A. No. Well, he would have this cough, this little bronchial cough, and then his head would be filled up from the sinus trouble. He would take a cloth and wet it with hot water and lay it on the sinus and he would go and hide himself so I would not see him do that.

Mr. MILLER. That is all, you may come down.

57 At this time, if your Honor please, we wish to offer in evidence the insurance contracts which are the subject matter of this suit. First, we offer insurance contract which bears the symbol K-455927 for identification, and we ask that it be marked plaintiff's exhibit number 1.

(Insurance contract No. K-455927 was marked "Plaintiff's Exhibit Number 1," for identification.)

Mr. MILLER. Secondly, we offer insurance contract which is policy number K-488958 which we ask to be marked plaintiff's exhibit number 2 for identification.

(Insurance contract No. K-488958 was marked "Plaintiff's Exhibit Number 2," for identification.)

Mr. MILLER. At this time, I wish to introduce in evidence plaintiff's exhibit number 1. I take it there is no objection.

Colonel CRENSHAW. No objection.

(Insurance contract No. K-455927 heretofore marked "Plaintiff's Exhibit Number 1" for identification was thereupon received in evidence.)

Mr. MILLER. I will read from the contract briefly. This is on the form which starts out:

"United States of America hereby grants insurance in the amount of \$5,000 to Albert Tyler Witbeck, the insured. This insurance is granted in consideration of and subject to the transferal and conditions hereinafter set forth, and in further consideration of the payment of the monthly premium of \$11.25, due and payable on the day this policy takes effect and on the
58 first day of each succeeding month during the lifetime of the insured. Receipt of the first premium is hereby acknowledged.

This insurance is payable in monthly installments of \$28.75 (hereinafter called the monthly installment) in the event of the

total permanent disability of the insured or of his death, unless one of the optional settlements is selected as hereinafter provided, then, in the event of the death of the insured this insurance is payable in accordance with the optional settlement so selected.

This insurance, subject to the beneficiary provisions hereof, is payable to Ella Tyler Witbeck, his mother, hereinafter called the beneficiary, in one sum." The policy then provides for disability benefits to the insured and death benefits to the beneficiary. I am going to take the time to read it all at this time. There is a clause on total permanent disability which states:

"Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."

The policy has several other clauses. It has a table of guaranteed surrender values and paid-up insurance after it has been in force for a certain number of years—from one to
59 thirty—which is usual in contracts of that kind, and it also has the extended insurance provision with disability benefits. I say this because no premiums were paid from 1932, but this extended insurance clause carried it until 1933. The contract says this with reference to extended insurance:

"Upon default in payment of premium and the expiration of the grace period, if the policy has not been surrendered for a cash value or for paid-up insurance, this policy shall be extended automatically as term insurance payable in monthly installments for such time from the due date of the premium unpaid as the cash-surrender value will purchase when applied as a net single premium at the attained age of the insured. The extended insurance shall be with right to total permanent disability benefits and with right to dividends payable in cash only. The number of the monthly installments will in any event be the same as may then be payable hereunder."

Mr. MILLER. This contract is issued on what is known as the ordinary life plan or ordinary life policy, and the second policy in the amount of \$5,000 is also issued on the ordinary life policy. I will note to you that the first policy is effective August 1, 1924, and the second policy is effective June 1, 1925, payable to the plaintiff, the mother, Ella Witbeck.

I think they are on about the same policy forms. There is the same government form number 741, and the first policy

60 shows that a loan has been made upon the security of the value of this policy. Any settlement made under this policy will be subject to any indebtedness due thereon, U. S. Veterans' Bureau, August 29, 1929. The same stamp appears on the other policy that a loan was made on August 29, 1929.

[Mr. Miller handed the policies to the jury.]

Mr. MILLER. At this time, if your Honor please, I would like to read from the report of the Commissioner which is filed in the case on page 4. I might state to you members of the jury that by way of explanation, in order to facilitate the trial of this case, we have a Commissioner appointed by the Court directing the Veterans' Administration to make a summary of the record evidence. I am going to read from the summary of such record. In other words, there is a stipulation between counsel in the case that this is a true record of the Veterans' Administration and it is subject to any objection.

First is the report of the physical examination made of the insured, Albert Tyler Witbeck, at the diagnostic center, U. S. Veterans Hospital, Washington, D. C. The report is dated January 24, 1929, and it shows, omitting the post war industrial history:

61 "Nervous system: sleep is irregular; has noticed that for the last three or four days he has slept better. Has difficulty in getting to sleep; 'because I was so worried'. Usually once he gets to sleep he sleeps all right until he gets cold; then he usually stays up because he can not get warm again. No disturbing dreams. Does not holler or talk in his sleep. Averages about five hours of sleep. Some nights just gets about an hour or two of sleep and would get up and get to work, by finding something to do like typewriting, reading, or anything else to occupy his mind. Usually feels rested when wakes up in the morning. Notices general weakness; sometimes feels weaker than others 'but I attribute all that to nerves; it has only been since about the first of this past December that I have been feeling that way'. Says he has been nervous ever since the war; manifested by twitching of the right eye. 'And I will get to thinking about something and maybe get worried about it.' Worries considerably about many things; about financial affairs, his boy's eye (having been shot), and business. Becomes depressed occasionally; has cried recently once or twice because of thinking about his home being broken up. Denies suicide trends. Says when he had the argument with his wife at home this past December he picked up an old broken pistol and threat-

ened to kill himself if she didn't leave him alone, but he had no intention of so doing because he knew it was broken. Has been very irritable, having noticed this a number of years. Says ordinarily he is in very good humor and is 'ordinarily good natured and always want to do something for somebody else'. Since discharge thought that everyone was against him; thought especially the 6th District of the Veterans' Bureau, New Orleans, was against him; made a complaint to the Director about that District. After his wife left him in December 1928, began to

62 think that probably there was something wrong with him and not everyone else. Has worried over the fact that once in 1920 he was on a committee investigating the actions of one of the doctors who is now at District #6 and that since then mostly every examination that he has had has been by this doctor, who he has thought was against him for having been on that committee. Says he never had a nervous breakdown since his trouble unless his present condition is one. Never had fainting spells, convulsions, herpes zoster. Never paralyzed. No motor or sensory disturbances except notices his feet go to sleep easily. Memory impaired; forget some things but other things he can remember just as well as anyone else; says his memory is good for dates and history, and at the time of the break-up in the family he was doing a great deal of research work for himself. Says all doctors and other people have told him he has a mind that has always got to be doing something; says he has always been very active mentally, studying, writing, reading, and thinking. Says he remembers a great many immaterial things that happened years ago and might forget things that happened recently. For instance, might have an errand to do downtown and is 'just liable to forget it as not because maybe there would be something else I would think of more important that would take place'. Never had lapse of memory. Has difficulty in concentrating; has noticed this in the last few years; attributes it to worrying. Is quick-tempered but says he has teased his wife just out of pure meanness and sometimes she would

63 take it seriously; says she also has teased him; says he would rather tease a person, like about being fat, than eat; 'not in a harmful way'. Sometimes has noticed a queer feeling if up high; has no desire to jump and couldn't exactly explain how it affects him 'except I have thought what an awful distance down it was'. Says one thing that worried him was because the Veterans' Bureau paid no attention to the pain in the back of his head and behind the right ear. Has a dull pain behind the

right ear and at the back of the head all the time; once in a while it gets sharp. Never had double vision. Has had blurring of vision if reading too much.

Present Complaints: Bronchitis. Deafness in the right ear. Extreme nervousness. Pain in back of the head and behind the right ear.

Report Signed. W. CAREY MELOY, M. D.,
Reception Service."

Mr. MILLER. I will now read the report appearing on pages 7 and 8 of Dr. R. K. Foxwell, Consultant in Neuropsychiatry in the Veterans' Administration. This report is dated February 20, 1929, and said report shows:

"This patient complains of a more or less constant dull headache in the back part of his head, associated with emotional depression. At times he has difficulty in concentrating. He is easily excited and quite irritable at all times. He states that for four or five years things have seemed to go wrong with him constantly. At the beginning of this he thought possibly
64 many people were persecuting him, but he states that now, as he looks back on it, he believes that it must have been something wrong with him. He has frequently had spells of depression in which he would cry for no apparent reason. He describes a feeling of marked apprehension that is almost constantly present. He feels that some catastrophe will overtake him for no apparent reason. Along with this he has had a chronic productive cough and dyspnea on exertion. His sleep has been irregular, frequently being disturbed by unpleasant dreams. Recently he has been tremendously worried about his failure to carry on and his failure to make sufficient money to adequately supply the needs of his family. After prolonged effort states he has some blurring of vision, but never double vision or vomiting. He feels generally weak and tires easily, and when tired is extremely irritable, flying into a rage on slight provocation. This has led to difficulties with his wife.

"The records show he enlisted in September 1917 and was discharged February 1919. Since discharge on numerous occasions he has been diagnosed as having bronchitis; and otitis media, right.

Neurological Examination: Shows a well developed, well nourished white man about 48 years of age. Station and gait are normal. Romberg is negative. Coordination is intact. The deep reflexes are present and normal in response throughout. The superficial reflexes are present and normal. There is no

Babinski, Oppenheim, or Cordon. The pupils react promptly, somewhat hyperactively to light and accommodation. The
65 right pupil is possibly slightly irregular in outline. There is a moderate tremor of the extended fingers, and the hands and feet are cyanosed. There is dermatogr'phia demonstrable on the chest. Somatic sensibility is normal. A spinal fluid examination recently made was completely negative.

"According to the history as given by the patient and also the history which is found in his folder, this man was adjusting well, working as a civil engineer before enlistment, and for a year or so following enlistment. There seems to have been a gradual slowing up in his ability, accompanied by marked depression and a feeling of apprehension with loss of self confidence.

Mental Examination: Today the patient is oriented completely in all spheres and shows an excellent memory for both remote and recent events. There is no evidence of mental deterioration. The patient is much depressed and apprehensive, and seems somewhat preoccupied with his own thoughts.

"Since residing at this clinic he has had numerous vague complaints and shown general dissatisfaction in a way characteristic of a patient that is depressed and apprehensive.

Diagnosis: Psychoneurosis, psychasthenia, moderate.

Recommendation: Hospitalization with appropriate psychotherapy."

Mr. MILLER. The next appears on page 9. It is a summary of case dated February 25, 1929.

"Discussion of Case: Admitted January 22, 1929, 'for exam
66 C. P. I. with psychotic episodes, manic phase. Other disabilities defective hearing right ear 50/40, chr. bronchitis, service connected,' this claimant was studied to February 21, 1929, with diagnostic results as listed above.

"While on ward he was self-important, quick to take a slight, and easily pleased by deference and compliment. Because he was not first taken each time he went to take basal metabolism test, he refused to wait. He asked for extraction of teeth, but when time came to have them out he claimed his Congressman had advised him not to have extraction done. He was critical of hospital methods, impatient of delay in rating him, and constantly veered to compensation attitude in his talk. The findings of the Neuropsychiatric Consultant on this rather erratic personality should be read. The other conditions are distinctly of minor present and future danger."

Mr. MILLER. On page 10 of the report it shows that he was in the following hospital on the dates indicated:

"Report of hospitalization of Albert Tyler Witbeck, dated January 18, 1939, furnished by the Budget Officer and Chief of Statistics, of the U. S. Veterans' Administration. Said report shows:

Hospital	Admitted	Discharged
V. A. Facility, Washington, D. C-----	12-30-26	12-30-26
V. A. Facility, Washington, D. C-----	1-22-29	5-16-29

67 The COURT. The jury will be excused until 1:30.

68

AFTER RECESS

The proceedings were resumed at 1:30 o'clock p. m. at the expiration of the recess.

Thereupon JOHN N. SANDLIN was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. MILLER:

Q. Judge, will you state your name and residence?

A. John N. Sandlin, and I am with the R. F. C. now.

Q. Just a little bit louder.

A. I am with the R. F. C. now.

Q. Judge, you were a member of Congress?

A. For sixteen years.

Q. In the Shreveport District of Louisiana?

A. Yes.

Q. In the course of your serving as a member of Congress did you have occasion to know Albert Tyler Witbeck whose insurance is the subject matter of this suit?

A. Yes; Captain Witbeck was what we called him.

Q. Over what period of time did you know him, approximately?

A. About ten or twelve years. I knew him before I came to Congress and then afterward.

Q. Were you a member of Congress in 1932 and 1933?

A. Yes.

69 Q. He died in December 1933. You knew him then until his death?

A. I did.

Q. Inviting your attention to the last few years of his life, 1931, 1932, and 1933, and on other occasions, just tell us what you personally observed about him.

A. He was in my office a good deal and I represented him before the Veterans' Bureau; I went down with him. He was in my office often.

Q. On these occasions just tell us what you personally observed about his condition.

A. Can I give my opinion about him?

Q. Yes; but state what you saw.

A. I don't know whether I can give you my opinion. Maybe an expert would have to do that. I can maybe best express it this way. I represented him before the Veterans' Bureau. He was in my office a great deal. I went down there with him.

I recall this: In representing him once, I told the board——

Colonel CRENSHAW (interposing). We object to what he might have told the board.

The COURT. Yes.

The WITNESS. He was a very nervous fellow.

By Mr. MILLER:

Q. Besides being nervous, what else did you notice about him?

A. I thought he was very unreasonable about the attitude he took about certain people—his wife and other people. It was entirely unreasonable. That was my opinion. I can't tell you what he told.

70 Q. No. How did he appear when you would look at him? Can you give us the best word picture of what he looked like to you—that is, how he acted, and so forth, out of the ordinary?

A. He was very nervous. If I made certain suggestions to him that I thought were reasonable, if it didn't suit him, he would go up in the air.

Q. Did he seem to be rational or irrational?

Colonel CRENSHAW. We object to leading questions.

Mr. MILLER. Very well.

The COURT. Sustained.

By Mr. MILLER:

Q. What else did you recall about him, Judge?

A. He objects to me saying whether I thought he was rational.

Q. You can just answer the question. He objected to the way I was going to ask the question.

A. Of course, I don't think he acted as a rational man.

Colonel CRENSHAW. We object to that, if the Court please, and move to exclude it. It came as a suggestion from Mr. Miller in trying to definitely to get it out of the witness.

The COURT. Yes.

Colonel CRENSHAW. We object to this judge's passing on the question of whether it was fair or not.

The COURT. Yes.

By Mr. MILLER:

71 Q. What else did you recall about him, Judge, as to his appearance, his demeanor, his personality, the impression he made on you, and what you observed about him?

A. It is pretty hard to answer that question.

Colonel CRENSHAW. We object to it on the ground that it is repetition. He has been over this and now asks him to go back and give him an answer.

The COURT. He may answer if there are other things to relate that came within his observation.

The WITNESS. He would talk about everything in the world that had nothing to do with his case. He thought it ought to be presented to the Veterans' Bureau and all that, and I didn't agree with him, of course, if I didn't agree with him he would get mad at me. He was that type of man. He was a very independent fellow in some ways and was a very good friend of mine. I would not say anything that would reflect on his memory at all. He wasn't well balanced at all. I wouldn't say he was a rational man.

Colonel CRENSHAW. We move to exclude that part about the rational man, because it was drawn by a suggestion of the question previously asked.

The COURT. I think it may stand.

By Mr. MILLER:

Q. As time went on, what did you observe about his condition, as you described, so far as the severity was concerned?

A. He didn't get any better.

Mr. MILLER. I believe that is all.

72 Cross-examination by Colonel CRENSHAW:

Q. When did you first know Mr. Witbeck?

A. I think it was about 1920.

Q. When did you first go to Congress?

A. 1921.

Q. You remained in Congress how long?

A. Sixteen years.

Q. You were not in Congress on December 4, 1933?

A. Yes; I went out, I think, in 1936.

Q. Congress was in session at that time, was it not?

A. Some part of it; yes.

Q. You were in Washington on that date, were you not?

A. I was in Washington when Congress was in session, yes.

Q. All through the years 1930, 1931, 1932, and 1933?

A. When Congress was in session.

Q. You spent most of your time in Washington when Congress was in session, did you not?

A. I did.

Q. You spent very little of your time in Louisiana?

A. I spent time at home when Congress was in session.

Q. Your contact with Mr. Witbeck was in Washington?

A. My contact was at home at first.

Q. I mean, in 1930, 1931, 1932, and 1933. Where was your contact then?

A. It was in Washington.

Q. That was in connection with his claim he had pending for retirement pay, was it not?

73 A. I don't know if it was in connection with that, but I was here then.

Q. What was your connection with him? You spoke of going down to the Veterans' Bureau.

A. I went down there with him. The records will show it and you got it. You ought to have it and you ought to have the statement.

Q. You would not dislike it if I didn't have it, would you, Judge?

A. No; but you ought to have it. If you would read the statement I made to the Veterans' Bureau about him, I would be glad—

Q. (Interposing.) You said a short time ago that he was very unreasonable about some things?

A. Yes.

Q. Did you ever consider yourself about being unreasonable?

A. Oh, yes. You have to. Every member of the jury has been unreasonable. That is human nature. I will admit that.

Q. I am glad you do.

A. Anybody who has common sense knows that.

Q. That was the reason you said Mr. Witbeck was irrational—because he was unreasonable?

A. No; that is not it. If you will let me tell you I will tell you about it.

Q. Sure.

A. He accused his wife and mother of everything unreasonable. I found it wasn't true.

74 Q. How did you know that it wasn't true?

A. Because I know people in Shreveport that knew him and his wife. He was wrong about it, that is all.

Q. He got the divorce?

A. I think, maybe he got it.

Q. You think maybe he did?

A. I don't know.

Q. You don't know that much about the case?

A. No.

Q. You don't know if his wife got the divorce?

A. If I would have—or I would have done it if I were his wife.

Q. You are a lawyer?

A. I was judge for ten years.

Q. Do you think you are being reasonable in your answers?

A. I am just as reasonable as you will let me.

Q. What have I to do with it?

A. You stop me.

Q. Do you know who filed suit for divorce in that case?

A. No; I don't know.

Q. I thought you said he did.

A. I say this: I would have.

Q. You say you are a lawyer. Did I ask you in my question what you would have done if you would have been his wife?

A. You asked me if I knew who filed suit for the divorce.

Q. What else did you answer to that question?

75 Mr. MILLER. I object, if your Honor please. The record speaks for itself—what he answered.

By Colonel CRENSHAW:

Q. Do you have any objection to the question I asked you?

A. You don't seem to want me to state the facts in the case.

Q. What makes you think that?

A. The way you object.

Q. Object to what?

A. Object to what I want to say.

Q. What did you want to say?

A. I want to tell what I knew about it, that is all. I have no interest in the case.

Q. Oh, you have not?

A. No; I haven't.

Q. Do you know that Mrs. Witbeck, during the pendency of that divorce proceeding, while it was on appeal in the Supreme Court of the State of Louisiana, went down and tried to have him prosecuted by a contempt proceeding?

A. I heard something about it. I don't know the facts of it.

Q. Do you know that was appealed in four different cases to the Supreme Court of Louisiana in connection with that divorce procedure?

A. No; I didn't.

Q. You say it was unreasonable for him not to like that? Is that your idea?

Mr. MILLER. I object to that question. That is not his
76 testimony.

By Colonel CRENSHAW:

Q. Do you mean to say it was unreasonable for him not to like a thing of that sort—an experience of that sort?

A. I didn't say whether it was unreasonable for him to like it or not.

Q. But he did discuss the question of his divorce with you?

A. Yes.

Q. He had his side of it, did he not?

A. Yes.

Q. He had his own ideas about who was right and wrong?

A. Yes.

Q. He insisted he was right, did he not?

A. Yes.

Q. You did not think so?

A. No; I didn't.

Q. You did not have all the evidence before you?

A. I had what people down there said about it.

Q. That was all hearsay, was it not?

A. I didn't have all the evidence, but I had the word of people in whom I had the utmost confidence.

Q. But you, as a man who had ten years on the bench, made up your mind about that case without having all the evidence before you?

A. I said I am unreasonable. All of us are unreasonable.

Q. Now then, Judge, let us get back to 1933. That is when he came to Washington to see about his retirement
77 pay, was it not?

A. Do you mean the first time?

Q. How many times did he come up here to see you?

A. I couldn't tell you.

Q. Any number of times?

A. Yes.

Q. Do you mean in the last two or three years of his life?

A. No.

Q. About how many times did he come up to see you in the last two or three years of his life?

A. I could not say; I don't remember.

Q. You have no idea about that?

A. I couldn't tell you; no, sir.

Q. You don't know whether it was one or one hundred times?

A. I know it wasn't one hundred.

Q. Was it fifty?

A. Well, no; not fifty. You are a lawyer.

Q. Both of us are.

A. That question is for the jury. Of course, he didn't come fifty times.

Q. You say you are a lawyer. Suppose you tell me and the jury.

A. I say I am a lawyer. I don't think I am a very good one—not as good as you are.

Q. Well, I don't know. Let us get it down.

78 A. Get it down? I have no interest in the case. I want to tell you this: I liked this man. He was a good political friend of mine. I liked him.

Q. You do not object to my asking you questions, do you?

A. No. You don't object to my answering them? Let us get good natured about this. The Government won't be broke if they win this case, you know that.

Q. Let us be reasonable about that.

A. I want to be reasonable.

Q. Will you just let me ask you a question?

A. Sure, I have to.

Q. Won't you just wait and let me ask you a question and then confine your answer to that question? Will you do that?

A. Sure, we will get along all right. I think you are a pretty good fellow.

Q. I am sure you are too. I want the jury to get some idea of how many times Mr. Witbeck came to see you in 1933 in Washington.

A. Well, to be perfectly frank with you, I can't tell you. I don't know.

Q. What do you mean by that? Do you mean you just haven't any idea whether he was here constantly in 1933?

A. He was there many times.

Q. Was he actually here in your office and did you actually see him in 1933?

A. I wouldn't say I did.

Q. It might have been before that?

A. It might have.

Q. Did you actually see him and know him in 1932?

79 A. I think so; I would not say that.

Q. You are not sure of that?

A. I can't tell you that.

Q. Are you sure whether you saw him in 1931 or not?

A. I think I did.

Q. Are you sure of it?

A. No; I am not sure, but he was there so darn many times, I could not tell you, my friend. He certainly was in my office many times.

Q. In Washington?

A. Yes.

Q. How long did he usually stay when he came up here to see you in your office?

A. I didn't know but what he was living here. When he came to my office he stayed a good while.

Q. What do you mean by a good while?

A. Half an hour—an hour.

Q. He came in and saw you, sat down and talked to you about his matters with the Veterans' Administration, and incidentally would bring up the family matters and talked about those?

A. Yes.

Q. You went down and helped him with the Veterans' Bureau?

A. I went once.

Q. You say he was unreasonable about what he was doing at the Veterans' Bureau? Did you say that or not?

A. I didn't say he was unreasonable at the Veterans' Bureau.

80 Q. What you mean there was with reference to his family troubles?

A. That is what I mean.

Q. There was nothing unreasonable about his conduct before the Veterans' Bureau?

A. No; I don't know—in fact, I thought he was reasonable when he was down there.

Q. Intelligent?

A. In a way, but he would fly off and get mad at the board and I would have to hold him down and tell him to keep his mouth shut.

Q. He was always that kind of man?

A. Yes.

Q. He was domineering in type, was he not?

A. That is true.

Q. Of your knowledge, back to 1920, that was his disposition? He wanted to do things his way about everything, did he not?

A. He certainly did.

Q. That was the same thing you noticed when he was up here in Washington in the last few years of his life?

A. If I advised him about the way I thought he ought to handle his claim he would get mad.

Q. He did not want to take your advice or anybody else's?

A. That is true.

Q. He is much different about that?

A. I take people's advice. I think I would take yours if we knew each other well. I understand your position. I think you are a pretty good fellow.

81 Q. What do you think my position is?

A. I think you are attorney, may be for the Veterans' Bureau. I don't know whether you are. I imagine you are, the way you talk.

Q. The Government is represented in this case. I just want you to look at that and see if you recognize Mr. Witbeck's signature on the bottom. It is Defendant's Exhibit Number 12 for identification. Do you know that signature?

A. Yes; I do. I have seen that often.

Q. Glance through that and see if you know anything about his claim there and if he was present in May 27, 1933.

A. I am not going into the details of his claim, because I could not remember it. I have had hundreds of veterans' cases. I could not tell you the details to save my life.

Q. You could not give exclusively of your time to one claim?

A. I gave a hell of a lot of time to him, because if I didn't he would jump over me.

Q. You gave some attention to the claim after he died, did you not?

A. He got my letter and that was in 1933.

Q. Give us the date.

A. December 4, 1933.

Q. That was after he died, was it not?

A. I don't know the date of his death, to be frank with you. He had been dead a long time before I knew anything about it.

82 Q. You did not know he was dead at the time you wrote that letter?

A. I didn't know when he died.

Q. Did you have anything to do with him trying to get a civil service job?

A. Yes, I think so. He was an engineer trying to get a job in the engineering department.

Q. What business was he in the last few years of his life?

A. I don't know.

Q. Did he ever tell you?

A. It seems to me he was an engineer trying to get a job in the engineering department.

Q. With the Government, under Civil Service?

A. He was an engineer.

Q. He was in the general engineering practice in Shreveport?

A. Yes.

Q. From May, 1931 to May, 1933, he was making \$3,500 per year, was he not?

A. I didn't know about that. I didn't know how much he was making.

Q. Did you ever hear of any other people having family troubles and getting divorces?

A. Oh, yes; thousands of them.

Q. You would not say a man was irrational just because he had family troubles?

A. No, I wouldn't say that.

Q. Mr. Witbeck was a fine looking man, was he not?

83 A. Yes, he had a good appearance.

Q. He was quite intelligent, well dressed, and well secured?

A. Yes, he was.

Q. He always talked intelligently?

A. You are not going to make me say that? He did about many things and some things he didn't.

Q. What things did he not talk intelligently about?

A. I don't think he talked intelligently about his wife.

Q. Is there anything else you know he did not talk intelligently about?

A. He had it in for a lot of people in Shreveport I didn't think he should have had. He had troubles. He felt like people had it in for him that didn't have it in for him at all.

Q. In other words, he thought he had some enemies?

A. Like you and I have.

Q. We lawyers think our enemies have it in for us?

A. That is a little different from that. Some of us have enemies. At the same time, we are fair enough to know they would not state anything entirely out of line. Let me say about Mr. Witbeck: I had a very high regard for him. He was a gentleman in many ways, and I liked him.

Q. He was just hot-headed?

A. That would not be the case entirely—about being hot-headed.

Q. Sincerely, seriously, and earnestly, you would not say he was crazy?

84 A. I would say he wasn't a normal man at all.

Q. I didn't ask you that. Sincerely, seriously, and earnestly, you would not say he was crazy, would you?

A. You know what I told you.

Colonel CRENSHAW. Will your Honor assist me?

The COURT. Answer his question.

Colonel CRENSHAW. Will you please read the last question?

The REPORTER [reading]:

"Question. Sincerely, seriously, and earnestly, you would not say he was crazy, would you?"

A. Will you let me say——

Q. (Interposing.) I want you to answer that question.

The COURT. That is not the question. The question is what you say now.

The WITNESS. I will tell you what I told the board at the Veterans' Bureau.

By Colonel CRENSHAW:

Q. I asked you a simple question. You have been a judge for ten years and also a lawyer. You know how to answer that question. Won't you please answer it?

A. I didn't think he was crazy in some ways, but in some ways I think he was. I will tell you what: I will answer this. I like you all right. You are a darn good lawyer.

He wasn't as crazy as you are or as I am, but he certainly was very abnormal about a lot of things. He was very unreasonable.

Colonel CRENSHAW. That is all.

85 The COURT. Have you anything further, Mr. Miller?

Mr. MILLER. Just one question.

By Mr. MILLER:

Q. Let me ask you just this one question, Judge. At one time did you almost feel that he was crazy?

A. I thought lots of times he was crazy about things.

Mr. MILLER. That is all, thank you.

The COURT. That is all.

Mr. MILLER. The witness may be excused, if your Honor please?

The COURT. Yes.

(The witness left the stand.)

Thereupon WILLIAM WITBECK was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. MILLER:

Q. What is your name and age, please?

A. William Witbeck, age twenty-two.

Q. Mr. Witbeck, how old are you?

A. Twenty-two.

Q. You are the son of Albert Tyler Witbeck?

A. Yes, sir.

Q. And this is your grandmother, the plaintiff in this case?

A. Yes, sir.

86 Q. When was it that you left your grandmother's home and went back to Shreveport where your father was living to live with him?

A. August, 1931.

Q. Did you live with your father continuously from August, 1931, until the date of his death in December, 1933?

A. Yes, sir.

Q. What were you doing there at that time?

A. You mean in Shreveport?

Q. Yes. Were you going to school?

A. Yes, sir.

Q. In 1931 and 1932 where were you living in Shreveport?

A. 1610 Crosswell Street.

Q. Is that the place where you lived ever since you were born?

A. Yes.

Q. How did it come that you went some place else to live?

A. The mortgage was foreclosed on the home.

Q. Where did you go to live then?

A. 308 East College Street.

Q. Where were you living there on this occasion?

A. In a garage apartment.

Q. That is, an apartment over a garage?

A. Yes, sir; one room.

Q. A one-room apartment?

A. Yes.

Q. About when was it that you and your father went to this one-room apartment to live?

87 A. Somewhere in 1933, I don't recall. I think it was in the summer.

Q. Inviting your particular attention to the time after you went back to your grandmother's home to live there with your father in Shreveport, particularly in 1932 and 1933, would you

just tell us in your own words what you now remember about some of the things your father did and what you saw him do?

A. I have seen him several times at night——

Q. (Interposing.) Speak a little louder.

A. He used to have one of these large knives that he used when he was a civil engineer—about four feet long and a big blade. Every night he used to go to sleep with that beside his bed. Quite a few times he would get up in the middle of the night and walk all around the house with the knife. He had an idea someone was in the house. He was highly nervous most of the time.

Q. He had an idea that someone was in the house? Would there come an occasion when anything would happen there, when you were asleep, that he would wake you up?

A. Oh, yes.

Q. Tell us what that was.

A. He used to wake the whole house up and walk all around and threaten at the time.

Q. Speak a little louder.

A. He walked all around and threatened at the time, but he never did do anything.

Q. Just tell us what else you know.

A. He used to go out in back. We had a little servant's quarters out in back and sometimes he walked all around there
88 in the middle of the night with a knife. I had a small pistol that was either a .32 or .38. He would go out there and look around there and had an idea someone was around.

At that time I had a collection of locomotives and railroad pictures and timetables. Lots of times he used to tear those up—when he got in his fits and rage—and other times he would help me collect them. Every once in a while it seemed like his mind would go blank.

Q. What would happen then, when his mind would seem to go blank?

A. He would lose his temper.

Q. What else do you remember about him?

A. I didn't like to ride with him very much, because at times, when he was driving along, all of a sudden, why, I don't know, he would just seem to go into a fit. He would drive reckless and was nervous most of the time. Lots of times, when he used to drive around in the streets of Shreveport, he used to turn the corners mighty fast, just for no reason at all.

Q. During the years 1932 and 1933—he died in December, 1933—what do you remember about any work he did?

A. None whatsoever—steady work.

Q. He did not do any steady work?

A. No, sir.

Q. What work would he do, if you remember?

A. I don't remember any at all. He talked about going to do work lots of times, but every time he got to the point of going to do it, that is all he got. Nothing ever did turn up, it seems like.

Q. What else do you recall about him, if anything, back
89 there in 1932 and 1933?

A. Well, he used my ties. He would make different—he had a collection of maps. He would get drawing on a map and all of a sudden he would tear it up; although it didn't amount to a thing. He would make four or five copies of it, get half-way started on it, and all of a sudden destroy it. Then, when he would write letters, it was the same way. He just could not seem to get anywhere.

Q. You were going to school during that time?

A. Yes, sir.

Q. Did you have your friends come to see you?

A. No, sir; he would not let anyone in the house.

Q. I did not understand you.

A. He would not let anyone in the house—that is, the crowd I went around with. Any time he wanted any of his own friends in, that was all right.

Q. What did you do? Did you do anything in the way of bringing any money into the family during 1932 and 1933?

A. Yes, sir; I did.

Q. What was it?

A. I had a paper route with the Shreveport Times. That was a morning paper. I would have to get up early in the morning and make a route. A lot of times he used to get up and follow me just to see I covered the route; in other words, he seemed suspicious that I would not cover the route; that I would go some other place.

I used to sell quite a few pictures and timetables. Every time the money came in I turned it over to him.

Q. You say he seemed suspicious. Did he seem sus-
90 picious about anything else?

A. He thought somebody was following either me or him at some time.

Q. When was it that you lost your job?

A. 1927.

Q. What do you recall, if anything, about him at that time?

A. Well, I don't particularly remember much then, except that he wanted to have an eye removed then. He went to Dallas to have it operated on over there. I went over there and put up such a fuss they couldn't do anything about it.

Q. Do you recall anything else now other than what you testified to about him being different or anything about his condition?

A. During 1931 when he went back from Troy—brought me back from Troy—he seemed to have a lot of friends. Just before he died he didn't seem to have any friends at all, for some reason or other, because no one ever paid any attention to him or anything like that. I don't know, he just seemed to drop out of the usual crowd. The American Legion—he lost a lot of friends in there.

Mr. MILLER. I believe that is all.

Cross-examination by Colonel CRENSHAW:

Q. Do you know who filed the first claim for your father's insurance after he died?

A. No, sir.

Q. Did you know it was the American Legion in Shreveport and Texas?

91 A. No, sir; I didn't.

Q. Do you think he lost a lot of his friends down there?

A. Yes, sir.

Q. How old are you now?

A. Twenty-two.

Q. How old were you in 1928?

A. Eleven.

Q. Pardon me if I ask you about some personal matters about your family. I do not mean to embarrass you whatever.

Do you recall the incident in which your father and mother were divorced?

A. Yes, sir.

Q. It was a sad experience for you, was it not?

A. Yes, sir.

Q. It was for your father, was it not?

A. Yes, sir.

Q. And for your mother?

A. Yes, sir.

Q. There were several different lawsuits?

A. I really don't know that.

Q. You did not know that? Did you know that they had a lot of litigation as to who was to have custody over you as a child? Did you know about that?

A. Yes, sir.

Q. After the divorce was over with where did you live immediately after that?

A. At 1610 Crosswell Street.

Q. With whom?

92 A. My father.

Q. Did you ever live with your mother?

A. No, sir.

Q. You never did?

A. Not after they were separated; no, sir.

Q. You either lived with your father or your grandmother since that time up to the present?

A. Up to 1933, the time he died.

Q. Where did you live since then?

A. With my mother.

Q. With your mother or grandmother?

A. My mother.

Q. Here in Washington?

A. Yes. Part of the time I was in Mississippi by myself.

Q. When you were living with your father down there until he died in 1933 were you living with your grandmother up in Troy or just visiting her?

A. I lived with her from July, 1929, to August, 1931.

Q. All that time you were in Troy, New York?

A. Yes, sir.

Q. Then, you lived there when your father drove up there and spent four weeks?

A. Yes, sir.

Q. You went home with him to Shreveport in the car?

A. Yes, sir.

Q. You lived with your father from July, 1931, until he died in December, 1933; that is correct?

A. Yes, sir.

93 Q. You lived first in the home with your father?

A. Yes, sir.

Q. After you lost that you moved over to the one-room apartment?

A. Yes, sir.

Q. You lived together in the same room?

A. Yes.

Q. Were you there when he took sick and died?

A. Yes, sir.

Q. It was very sudden and he was actually ill, was he not?

A. Well, I don't know. I would not say so sudden. It was about a week.

Q. All of a sudden he got worse and had very heavy pains?

A. Yes, sir.

Q. They took him to the hospital?

A. He went to the hospital. He went in his own car.

Q. They did not take him in an ambulance?

A. No, sir.

Q. He was able to walk into the hospital?

A. Well, he wasn't exactly able, but he did.

Q. They operated on him almost at once the next day, did they not?

A. I don't know.

Q. He died in about two or three days, did he not?

A. Yes, sir.

Q. Just a short time after he had been operated on?

A. Yes, sir.

94 Q. You went to the hospital to see him?

A. Yes, sir.

Q. He had you go to school?

A. No, sir, I wasn't attending school then.

Q. That was in December, 1933, you were not going to school then?

A. No, sir.

Q. How old were you, about sixteen years old?

A. Yes, sir.

Q. Had you finished high school?

A. No, sir.

Q. Why didn't you go to school?

A. I had an illness in November and I haven't returned to school yet.

Q. You had been to school up until that time?

A. Yes, sir.

Q. You went to high school in Shreveport in 1931 and 1932?

A. The latter part of 1931, yes, sir.

Q. You went on through that year of high school?

A. Yes, sir.

Q. Did you start again when you went back in the fall of 1932?

A. Yes, sir.

Q. You stayed in school until the spring of 1933?

A. Yes, sir.

Q. Did you enter again in the fall of 1933?

A. Yes, sir.

Q. And stayed until November, when you got sick?

95

A. Yes, sir.

Q. And you had not started back when your father died?

A. No, sir.

Q. Were you sick in bed at the time your father died or not?

A. No, sir.

Q. Your father had a large library of books, did he not?

A. Not at the time he died. He did, at one time.

Q. What did he do with those books?

A. He eventually sold most of them?

Q. He gave them away?

A. He sold most of them.

Q. He gave them to Dr. Carden?

A. Dr. Carden? He didn't give them to Dr. Carden.

Q. Did you not know that he gave Dr. Carden a good many of his books?

A. No, sir.

Q. You did not know anything about that?

A. No, sir.

Q. If he did give them to him you just did not know it?

A. I would have known it.

Q. You state positively he did not give them to him?

A. Positively.

Q. Dr. Carden was a frequent visitor or your father frequently visited Dr. Carden?

A. Yes, sir.

Q. Did you go with him?

A. Most of the time.

96 Q. Did you sit around the room where they were talking?

A. Yes, sir.

Q. Your father wrote a great deal, did he not?

A. No, sir.

Q. He did not write a great deal?

A. No, sir.

Q. Do you know anything about articles for magazines that he wrote?

A. No, sir.

Q. Do you know anything about lectures he wrote and delivered before engineering societies and things of that sort?

A. No, sir.

Q. Do you know anything about his correspondence—to whom he wrote?

A. He didn't have any correspondence up until a couple of years before he died.

Q. Do you know whether he ever wrote your mother after they were separated?

A. Yes, sir.

Q. As long as he was living had he not?

A. Yes, sir.

Q. He was much worried and bothered about the divorce and separation, was he not?

A. Yes, sir.

Q. He regretted it very much, did he not?

A. Yes, sir.

Q. He wanted to go back and make up with your mother?

97 A. Yes, sir.

Q. He became very nervous and worried about that part of it, did he not?

A. Yes, sir.

Q. He was worse in that respect right after the divorce than he was later, was he not?

A. No, sir.

Q. When was he worse?

A. From the latter part of 1932 until the time he died.

Q. You spoke about your father writing some papers and tearing them up. Do you know to whom they were written?

A. No, sir.

Q. You do not know whether or not they were letters to your mother?

A. I would not say.

Q. You spoke of drawing maps and tearing those up?

A. Yes, sir.

Q. Do you know what they were in reference to?

A. Yes, sir.

Q. What?

A. A collection of railroad photographs—different roads in Louisiana and Texas. As I said before, I used to have a collection of locomotive photographs. He drew maps for me of different places to visit—that is, terminals of railroads where they had equipment that no other photographers could reach. There are about one hundred fifty thousand in the United States that does that, and most all of the photographers tried to get the small roads. At times he would help me and then destroy them.

98 Q. You were very much interested in locomotives, engines, and things of that sort?

A. Yes, sir.

Q. That is, to study the mechanical parts?

A. Not necessarily that.

Q. Just the oddities about that peculiar character of one as compared to the other?

A. Yes.

Q. You got your father interested because of your interest?

A. Yes.

Q. You had good maps and the different things pertaining to them?

A. He would try to draw them, get started, and then destroy them, never completing one.

Q. Did you know whether he was an expert engineer or not?

A. What kind of engineer?

Q. A civil engineer.

A. He was at one time.

Q. What was the last work he did for anybody as a civil engineer?

A. I don't know.

Q. Did you know anything about the civil-engineer work he did for the last year or two of his life?

A. He didn't do any.

Q. Are you sure of that?

A. Yes.

Q. How old were you when he died?

99 A. Sixteen.

Q. Did he do any kind of work for anybody in connection with his profession?

A. No, sir; not over the latter part of 1932 until the time he died.

Q. You are sure of that?

A. Positive.

Q. Do you remember the instance when he testified in Court as an expert witness?

A. No, sir.

Q. He did not do that?

A. I don't remember it.

Q. Are you sure whether he had or had not?

A. What case was that?

Q. The Sabine Lumber Company against Broderick.

A. No, sir; I don't remember it.

Q. You do not know anything about it?

A. No, sir.

Q. But he may have testified, so far as you know?

A. I don't think so.

Q. In the last year of his life?

A. I don't think so.

Q. But you would not be sure about it, would you?

A. I am sure. I usually kept track of what he did. We went together most of the time.

Q. Did he do any work for Mr. Williams? Do you remember him?

A. No, sir.

Q. Do you know Mr. C. E. Evans?

100 A. No, sir.

Q. Do you know whether he did any civil engineering or oil work for him?

A. No, sir; he didn't.

Q. Where did he have his office?

A. When they were living at 1610 Crosswell Street he had a room that was piled with junk. I guess you could call that an office.

Q. Where was that?

A. 1610 Crosswell Street.

Q. Do you mean at home?

A. Yes, sir.

Q. You knew Mr. Van Os?

A. Yes, sir.

Q. The man who is the administrator of his estate?

A. Yes, sir.

Q. He had an office at one time, did he not?

A. Yes.

Q. Didn't your father have an office with him in May, 1933?

A. No, sir.

Q. He did not keep an office there?

A. No, sir.

Q. He did not use Mr. Van Os' office?

A. No, sir.

Q. He had nothing to do with it?

A. He went up there occasionally. I don't know whether he had anything to do with it or not.

Q. It was not over a year before Mr. Witbeck, your
101 father, died that he did some engineering work for Mr. Broderick W. Williams. Do you remember him?

A. No, sir; never heard of him.

Q. He is an oil operator in the City of Shreveport. Do you remember him?

A. No, sir.

Q. Do you know where Hockskins Lake is?

A. No, sir.

Q. You never heard of that lake close to Shreveport?

A. No, sir.

Q. Don't you know that your father did some engineering work over there from Broderick W. Williams?

A. He might have done it, but it wasn't a year before he died.

Q. Did you ever know Mr. R. O. Roy?

A. I have heard of him.

Q. Did you know of some work your father did for him?

A. No, sir.

Q. You do not know anything about the work he did for him?

A. No, sir.

Q. Your father used to attend the meetings of the American Legion and the Forty and Eight?

A. Not for two years before he died, he didn't.

Q. Not for two years before he died? Did he read a lot?

A. No, sir.

Q. Did he write a lot?

A. No, sir.

102 Q. How did he occupy his time?

A. Just staying at home most of the time.

Q. Doing what?

A. Nothing.

Q. Do you mean sitting down in bed?

A. Laying down a good deal.

Q. Did he ever leave town on any trips?

A. One.

Q. Where did he go?

A. Somewhere over in Texas. I just don't recall where it was.

Q. When was that trip made?

A. In the summer of 1933, in June.

Q. Did he drive in his car?

A. No, sir; I drove it.

Q. He went in his car and you drove it for him?

A. Yes, sir.

Q. Over to Dallas, Texas?

A. No, sir; it was just over the state line.

Q. How long was he gone?

A. About three days, I think.

Q. Do you know what he was doing over there?

A. Visiting.

Q. Visiting whom?

A. Friends.

Q. Some of those he had not lost; is that right?

A. No, sir; I think they were still his friends.

Q. Is that the only time you knew of him being out of town before he died?

103 A. I would not say that.

Q. He drove his car close by Shreveport on occasions?

A. Yes, sir.

Q. Did he get out of town for several days at a time?

A. No, sir.

Q. Never?

A. No, sir.

Q. He did not come to Washington?

A. No, sir.

Q. Do you know anything about him coming here to see Judge Sanburn?

A. He didn't come to Washington in 1933.

Q. He did not see Judge Sanburn how long before he died?

The COURT. His name is Judge Sandlin.

Colonel CRENSHAW. Yes; your Honor.

The WITNESS. I do not think he was in Washington. I know he came up here some time before 1932.

By Colonel CRENSHAW:

Q. Before 1932?

A. Before 1931 it was. I didn't think he came to Washington on Sundays and Mondays after the time he drove me back.

Q. He was up in New York in July, 1931?

A. Yes, sir.

Q. He drove back in a car?

A. Yes, sir.

Q. Which direction did he go to go back home from there?

A. We followed Route 11 back.

Q. Where does that lead through?

104 A. Closer to Washington. It is over here at Hagerstown and goes south through Winchester, over that way.

Q. Was it after that you think he came to Washington?

A. No, sir; he didn't come to Washington.

Q. After you went back to Shreveport in July, 1931, he never did come to Washington?

A. I don't think he did.

Q. You were living with him all the time?

A. Yes, sir.

Q. You say he did not come back to Washington during that interim; is that right?

A. Yes, sir.

Q. Do you remember when he did that surveying work at Biggsdale Airport?

A. He didn't do any over there.

Q. He never did?

A. No, sir.

Q. Do you mean to say he never did any in 1928 or 1929?

A. No, sir.

Q. How do you know what he was doing when you were in New York?

A. He didn't do a bit because he took a Civil Service examination. I don't recall whether he passed it or not, but anyway he didn't do any work there, because I heard him talk about it several times afterward. It seemed like everytime he would get a job they would put someone in ahead of him.

Q. You know he applied for a Civil Service job? You talked to him about that?

A. I mean, just——

105 Q. (Interposing.) Before he died?

A. No, sir.

Q. He did not mention anything about applying for Civil Service on December 26, 1933?

A. No, sir.

Q. You did not know anything about that?

A. No, sir.

Q. That is a picture of your father there, is it not?

A. Yes, sir.

Q. That is his signature right here, is it not?

A. Yes, sir.

Colonel CRENSHAW. That is part of Exhibit Number 27 for identification.

By Colonel CRENSHAW:

Q. Did you know anything about work he did for the Arkansas National Gas Company of Shreveport?

A. I think he used to work there.

Q. Do you know anything about W. Z. Hodges of Grove, Louisiana?

A. Yes, sir.

Q. Did he work for him?

A. Not recently.

Q. You did not know Mr. R. O. Roy?

A. I heard of him. I didn't know him personally.

Q. You did not know anything about the work your father did for him?

A. He didn't do any, I think.

Q. Do you know Mr. J. S. Sny?

A. Yes, sir.

106 Q. Do you know anything about the work he did for him?

A. I know he did some work for him. I think he was working for him in 1926 and 1927.

Q. '26 and '27? That was when you were about eight or nine years old; is that right?

A. Eleven years old.

Q. You remember that?

A. Yes, sir.

Q. How about Judge W. C. Barnett? Do you remember any work he did for him?

A. No, sir.

Q. Do you know Mr. Lane Mitchell—a civil engineer in Shreveport?

A. No, sir.

Q. Do you know any work he did for him or with him in the last three or four years of his life?

A. No, sir.

Q. Do you know anything about Mr. Charles Evans, of Shreveport, or any work that he did?

A. No, sir.

Q. Or with Mr. Van Os?

A. No, sir.

Q. Did you ever know Mr. Brown? He was with the American Legion.

A. Several Browns. What is his first name?

Q. E. W. Brown.

A. Yes, sir.

Q. Did you know that your father went down there to legion meetings very frequently with Mr. Brown before he died?

107 A. No, sir.

Q. How many brothers and sisters did your father have?

A. None.

Q. None, did you say?

A. None.

Q. The only ones in the family are you, your mother, and grandmother?

A. Yes, sir; she had a stepson.

Q. You say that your father did not do any work in the three years after you went back down there and lived with him. How did he manage to live?

A. He had a government pension.

Q. Do you know how much that was?

A. No, sir.

Q. About \$150, was it not?

A. No, sir; it wasn't that much.

Q. It had not been that much?

A. I am pretty sure it wasn't; no, sir. Whatever it was, it was reduced quite a good deal.

Q. Who were the family physicians there for the family?

A. None.

Q. You had no family physician?

A. No, sir.

Q. Was it not Dr. Carden?

A. No, sir.

Q. Was it not Dr. Curley?

A. Never heard of Dr. Curley.

Q. Did you know Mr. F. E. L. Case?

A. No, sir.

108 Q. The District Manager of United Gas Company?

A. No, sir.

Q. You say you never heard of Dr. Curley?

A. No, sir.

Q. Did you always stay home at night?

A. Yes, sir.

Q. You never went anywhere?

A. No, sir.

Q. Just went to school, delivered papers in the morning, and stayed home at night?

A. I went to the railroad yards in the afternoon.

Q. You went to the railroad yards in the afternoon to look at the locomotives?

A. Yes; and stay around them.

Colonel CRENSHAW. All right, that is all.

(The witness left the stand.)

Mr. MILLER. If your Honor please, at this time I would like to read some depositions I took down in Shreveport. The first deposition is that of Judge W. C. Barnette. These depositions were taken in Shreveport, Louisiana, on the thirteenth of March of this year before Mrs. John Marshall, a notary public. There was present, representing the plaintiff, myself, and representing the defendant, George Morris Fay, the attorney for the Govern-

ment, who was in here a while ago. The deposition of Judge W. C. Barnette is as follows:

(The deposition of Judge W. C. Barnette, taken at Shreveport, Caddo Parish, Louisiana, on the thirteenth day of March, 1939, in District Courtroom "B", Parish of Caddo, State of Louisiana, before Mrs. John Marshall, Notary Public in and for the Parish of Caddo, State of Louisiana, pursuant to agreement of counsel for plaintiffs and defendant, was read by Mr. Miller and Mr. Costello.)

Mr. MILLER. This is the deposition of Dr. Willis P. Butler, and is as follows:

(The deposition of Dr. Willis P. Butler, a witness on behalf of plaintiffs, taken at Shreveport, Caddo Parish, Louisiana, on the 13th day of March, 1939, in District Courtroom "B," Parish of Caddo, State of Louisiana, before Mrs. John Marshall, Notary Public in and for the Parish of Caddo, State of Louisiana, pursuant to agreement of counsel for plaintiffs and defendant, was read by Mr. Miller and Mr. Costello, and the following occurred during the reading of the deposition:)

The COURT. Come to the bench.

(Counsel for both sides approached the bench and conferred with the Court in a low tone of voice, as follows:)

Mr. COSTELLO. I object to the answer on page 22, beginning with, "In conference with Mrs. Witbeck," continuing on page 23 and 24 ending, "made us suspect there was something wrong." The answer is based on history.

Mr. MILLER. The objection is made to the last question on page 22 which is, "Doctor, just tell us in your own words what occurred on or about the 3rd of December, 1928, according to your recollection as refreshed by your official records."

The COURT. Was he the coroner on that date?

Mr. MILLER. Yes, if your Honor please; he was.

Mr. COSTELLO. It does not seem from the testimony in 110 the case that the witnesses were sworn, and that the testimony was taken semiofficially. Some people came along and told him this story and he is now relating it; as a matter of fact, it does not appear to come out of the record.

Mr. MILLER. He refreshed his recollection from the records. As I recall, he was reading the record.

The COURT. The question was, According to your recollection as refreshed by your official records. I will overrule the objection.

(At the conclusion of the foregoing conference counsel returned to the trial table and the trial proceeded as follows:)

(The reading of the deposition was resumed.)

Mr. COSTELLO. Referring to the bottom of page 24 and the top of page 25, we object to the introduction of that report.

The COURT. Come to the bench.

(Counsel for both sides approached the bench and conferred with the Court in a low tone of voice, as follows:)

The COURT. What report is that?

Mr. MILLER. It is the report that appears on the last page of the deposition.

The COURT. The report dated December 13, 1928?

Mr. MILLER. I believe that is it.

The COURT. This is the report of the coroner, is it not?

Mr. COSTELLO. My objection is that all of it is based on hear-say testimony of other witnesses. His whole opinion
111 and diagnosis is based on statements made by other people to him. His wife is a very much interested party in trying to get him locked up. They were engaged in the divorce suit at the time. I say the parts your Honor has already permitted to go in there are statements made by this coroner from other people.

The COURT. I think it indicates that the report was official. I think it may be received.

Mr. COSTELLO. For instance, if a man came in here and testified in Court, could we prove his testimony by——

The COURT. This looks like a report of an official examination.

Mr. COSTELLO. I know, but his whole opinion is based on the statements of these other parties. Take the parties who came into the coroner's court and whose testimony was taken, could we put them on as we might witnesses here and let them testify?

The COURT. I think the Court may assume he proceeded in a lawful manner.

Mr. COSTELLO. We have had no opportunity to examine these people.

The COURT. I realize that.

Mr. COSTELLO. We are permitting them to testify in an ex-parte statement, even considering the assumption that the coroner must have sworn them. But, is that testimony with reference to facts? Is that admissible? In the first place, if it is not, then the findings of the coroner based on that would not be admissible. I don't believe it is admissible. If the first part is admissible, then the
latter part is too.

112 The COURT. I think I will take it. Objection overruled.

(The report of the coroner was read by Mr. Miller and is as follows:)

"DEC. 13, 1928.

"Report in Case of Mr. A. T. Witbeck.

"After going into this case as thoroughly and carefully as possible, we think that Mr. A. T. Witbeck is not insane but that his case would be diagnosed as Constitutional Inferiority with emotional instability and compensatory reactions as a result. A bilateral sinus infection and also some evidence of a beginning organic change in the central nervous system as evidenced by the positive Babinski.

"We further believe that his physical troubles, as mentioned in this report, should have careful attention in competent medical hands.

"As to his mental condition, we believe that he should be at least for some time, in care of a competent neuropsychiatrist that he might have the benefit of treatment for the condition mentioned in the report attached hereto. We strongly recommend that he not return to his recent environment until he can be what is commonly termed psychoanalyzed and have explained to him just how this condition came about and then receive proper instruction as to what he should do. We do not wish to be responsible for what he might do should he continue to have these violent attacks of temper as we fear he would harm someone or get hurt himself.

113 "Our recommendation is that he be turned over to the kind custody of his friends who will carry out these ideas. We further believe that a stay of sufficient time to properly treat him in one of the Government institutions for ex-service men suited to such cases would be of advantage to him.

"Respectfully submitted,

"(Signed) ROY CARL YOUNG, M. D.

"WILLIS P. BUTLER, M. D.

"Coroner."

The COURT. Was there more to the report?

Mr. MILLER. Yes; if your Honor please. Did your Honor read just the first page? There is some more to it. I am not offering anything but the first page. If your Honor please, the record shows I am only offering the first page of the report. That will eliminate the necessity of further conference.

(At the conclusion of the foregoing conference counsel returned to the trial table and the trial proceeded as follows:)

The COURT. Considering your request now, it should be limited to the first page?

Mr. COSTELLO. You are just offering it as part of the testimony?

Mr. MILLER. I am offering the report signed by the witness who has testified, Dr. Willis P. Butler.

Mr. COSTELLO. We object to him offering a part of the testimony, selecting that testimony which he took himself, and leaving out the rest.

114 Mr. MILLER. If you withdraw your objection to offering the report——

Mr. COSTELLO. I am objecting to the whole thing.

The COURT. May I see you?

(Counsel for both sides approached the bench and conferred with the Court in a low tone of voice as follows:)

Mr. MILLER. Dr. Butler is the coroner in this case.

The COURT. This does not indicate it was a part of this report.

Mr. COSTELLO. It is the same, your Honor. That has reference to the other part he read. It is all the same report. It is signed on the bottom. It is a part of his testimony, and he identified it. I am objecting to the parts of his testimony he is taking. He has identified this report. If he can select that portion of the testimony in the way of taking his own deposition he could eliminate anything unfavorable to him and thus, anything that is favorable he could keep in.

Mr. MILLER. If your Honor please, you will observe this was dictated by Dr. Young, and Dr. Young was not the coroner.

The COURT. Did Dr. Butler identify these several pages as his report in his testimony?

Mr. MILLER. Let me see the record just a moment. Page 24 is his identification.

The COURT. I think it must be taken as presented.

Mr. MILLER. If your Honor please, I am just offering the first page.

The COURT. I do not think you may be permitted to do that.

It is quite apparent that his report as read has foundation.
115

Mr. MILLER. Will I have to read every word of it in order to offer it?

The COURT. I think so.

Mr. MILLER. If I have to read it all to get it in, it is all right.

The COURT. To begin with, you see, it shows right at the very beginning how he complained. Then it shows how the various tests were made and that he signed the report based upon that. Perhaps it would not be properly understood without knowing what he had attached——

Mr. COSTELLO. We object to the whole thing on the ground of statements made to this man by other parties..

The COURT. I will let you read that. That will be all for today. I will ask the jury to be back at 10:00 o'clock tomorrow morning.

(Whereupon at 3:30 o'clock p. m. an adjournment was taken until tomorrow, Tuesday, March 29, 1939, at 10:00 o'clock a. m.)

116

Transcript of proceedings—Volume 2

Filed November 1, 1939

PROCEEDINGS

Mr. MILLER. If your Honor please, continuing the depo-
117 sitions, I don't recall what was on the record yesterday evening just at the close. In order that the record may be straight I just wanted to say with reference to the remainder of the report—that is, pages 2, 3, and 4, identified as P-1B, P-1C, and P-1D, it was not the desire of the plaintiff to read these to the jury, but Government counsel insists it be read. I understand, in accordance with your Honor's ruling, it must be read at this time.

The COURT. The Court thinks the entire report should be read after having looked it over.

Mr. MILLER. Yes, your honor. Yesterday I read the report of Willis P. Butler, Coroner of Shreveport, Louisiana. I will now read pages 2, 3, and 4 of that report.

(Mr. Miller read pages 2, 3, and 4 to the jury as follows:)

“Copy

“Drs. Young and Young

“This is to certify that I examined Mr. Witbeck at the request of Dr. Willis P. Butler.

“Complaint—from wife: Husband has been brutal and has struck her several times. Placed a gun to his head and threatened to commit suicide. This occurred once when the child was present. His wife states that he has bored several large holes in the roof so that he could spy on the people in the apartments next door; that he spends a great deal of his time at home peeping through the holes. She also states that he did tear a hole in their transom so that he could spy on a couple who had rooms at their house several years ago and that she removed the curtain
118 and painted the transom, but he removed a small portion

of the paint so that he could peep. According to her statements, he never was interested in peeping unless there were women present. She further states that he is precocious sexually and desires intercourse three or four times a day. If he has any suspicion that she did not enjoy the act he flies into a violent rage. She states that he has told his child that its mother was not a good woman; that he has neglected his business that he may engage in historical research.

MENTAL EXAMINATION

Posture and attitude: Tension.

Flow of ideas: Correlated and rapid.

Sociability: Pleasant and anxious to make a good impression.

Memory: Recent and remote, good.

Orientation: Time, place, and person, normal.

Attention: Good.

Retention: Good.

Anxiety Trends: Present in regard to his professional work as regards to failure and financial success and regarding his physical condition. Also a fear that he may be harmed by relatives of a man that he refused a discharge in the Army. Has been somewhat apprehensive regarding this especially during the last few months.

Hallucinations: None.

Delusion: None, but rather a delusional trend.

Grandiose ideas and Egotism: Ego rather marked.

Insight: Says something wrong and wants to know what
119 it is.

Pupils: Right slightly larger than left. Both react to light and accommodation.

"Copy

Drs. Young and Young

Fundi: Slight arteriosclerotic changes, both eyes.

Ear: No tuning fork sensation over right mastoid.

Cilio-spinal reflex: Present.

Consensual reflex: Present.

Cranial Nerves: Intact except for above.

Station: Normal.

Gait: Normal.

Speech: Normal.

Coordination: Normal.

Special senses: All right except hearing.

Superficial reflexes: Babinski positive on right.

Gordon, Oppenheim, and Chaddock: Negative both sides.

Sensations: Normal.

Remarks:

This case, in all of its phases, was investigated by the Coroner and the Sheriff's Office. These facts helped me very much in coming to a diagnosis. X-ray work, spinal puncture, and blood work were all done at the Schumpert Sanitarium and copies of these reports will be found attached hereto.

Diagnosis: Constitutional Inferiority with emotional instability and compensatory reactions as a result. A bilateral
120 sinus infection and also some evidence of a beginning organic change in the central nervous system as evidenced by the positive Babinski.

Precipitating Factors: Influencing present condition are the following: Financial worries regarding his inability to get work in his present profession. Social maladjustment in the home. Worry regarding his child. Sinus infection.

RCY: WS.

"Laboratory Reports; Mr. A. T. Witbeck

December 10, 1928

White cell count, 11,450.

Differential Count: Polys. 83; LL 5; SL 11; E 1.

Blood Wassermann: Negative in all antigens.

C. S. F.

Wassermann, negative.

Cell Count: 3.

Globulin: Faint trace.

Sugar: 65 mgs.

Total Protein: 36 Mgs.

Colloidal Gold: 0000000000."

Mr. MILLER. That completes the entire report.

(The reading of the deposition of Dr. Willis P. Butler was resumed and the following occurred:)

(Counsel for both sides approached the bench and conferred with the Court in a low tone of voice, as follows:)

Mr. COSTELLO. Objection on page 34.

121 Mr. MILLER. That is the question beginning with,

"Doctor, have you an opinion * * *."

The COURT. Objection sustained.

Mr. COSTELLO. Objection on page 35 to the first answer.

The COURT. There was no objection or motion there yesterday.

Mr. COSTELLO. At the time the deposition was taken, your Honor.

The COURT. Yes.

Mr. COSTELLO. Our stipulation covers that, your Honor.

The COURT. Is the objection made now?

Mr. COSTELLO. Yes.

The COURT. I suppose it would be a motion on the ground of the objection.

Mr. COSTELLO. On the ground, your Honor, that is just the particular question in the province of the jury to decide.

The COURT. The motion is to exclude the answer and that motion is granted. Was there something else down here?

Mr. COSTELLO. I think it runs all the way down here, your Honor. It is the same line of questioning.

The COURT. I think the last question and answer may be taken. The first part of it is excluded.

(At the conclusion of the foregoing conference, counsel returned to the trial table and the trial proceeded as follows:)

(The reading of the deposition of Dr. Willis P. Butler was resumed.)

Mr. MILLER. This is the deposition of Lucy C. Mathews.

(The deposition of Mrs. Lucy C. Mathews, a witness
122 on behalf of the plaintiffs, taken at Shreveport, Caddo
Parish, Louisiana, on the 13th day of March, 1939, in
District Courtroom "B", Parish of Caddo, State of Louisiana,
before Mrs. John Marshall, Notary Public in and for the Parish
of Caddo, State of Louisiana, pursuant to agreement of counsel
for plaintiffs and defendant, was read by Mr. Miller and Mr.
Costello.)

Mr. MILLER. This is the deposition of Mrs. Marguerite Carlton Blane.

(The deposition of Mrs. Marguerite Carlton Blane, a witness
on behalf of the plaintiffs, taken at Shreveport, Caddo Parish,
Louisiana, on the 13th day of March, 1939, in District Courtroom
"B", Parish of Caddo, State of Louisiana, before Mrs. John Mar-
shall, Notary Public in and for the Parish of Caddo, State of
Louisiana, pursuant to agreement of counsel for plaintiffs and
defendant, was read by Mr. Miller and Mr. Costello during which
the following occurred:)

(Counsel for both sides approached the bench and conferred
with the Court in a low tone of voice, as follows:)

Mr. COSTELLO. Objection to the last answer on the bottom of page 60. I do not think it is responsive to the question and part of it is hearsay.

The COURT. That part about the telephone, perhaps, is not within the personal knowledge of the witness. I think that may be excluded, but you may begin the answer with these words, "I remember him coming to the front door * * *."

(At the conclusion of the foregoing conference, counsel
123 returned to the trial table and the trial proceeded as follows:

Mr. MILLER. If your Honor please, at this time I would like to suspend the depositions. There is a witness here.

The COURT. All right.

Thereupon Dr. RAY F. GUYNN was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. MILLER:

Q. State your residence, name, and occupation.

A. Ray F. Guynn, 1616 16th Street, Northwest. I am a physician.

Q. State, for the record, your education, training, and experience.

A. I had a preliminary course at the University of Virginia, three years after which I studied medicine at the George Washington University, graduating in 1921. Following that I had training in psychiatry at St. Elizabeths, and I also studied at Mount Alto. I was later with the Veterans' Administration, where I served several years. Later I was at the Diagnostic Center in Washington. There I lectured to the post-graduate classes of neurology and psychiatry. I am in private practice now and I am a member of the staff of one of the hospitals here.

Q. What is your specialty?

A. Neuropsychiatry.

Q. I do not suppose you ever had occasion to examine or treat Albert Tyler Witbeck?

124 A. Not that I know of.

Q. When a Babinski is positive on the right, what does that indicate?

A. On the Babinski sign, a test is given to patients to determine whether they have some organic involvement of the nervous system. If a patient had a Babinski on one side you would think that he had perhaps had some organic condition of the nervous system.

Q. When there is a beginning organic change in the central nervous system, what conclusion would you, as a physician, have as to what is taking place in that individual?

A. I would believe the person is suffering from some physical disease which was attacking his nervous system, and this probability, that it might increase.

Q. Is that a disabling condition, Doctor?

A. Yes; it is.

Q. How so?

A. Well, the nerve tracts of the nerve cells of the brain are being involved by some process, some poison, or some disease, and that is naturally disabling from a physical and mental standpoint.

Q. What is meant by "emotional instability"?

A. It means a person who is mentally unstable or excitable, part of the time very depressed, and they get excited on small provocation. Their emotions go up and down, and they are a little more susceptible to stimuli of different kinds than the average individual.

Q. What is meant by "psychiatric episodes"?

A. Psychiatric is the word used to indicate that the
125 person is suffering from sort of delusions or hallucinations.

The medical word is synonymous with the word, more or less synonymous with the word "insanity." We mean the patient is really mentally disturbed.

Q. When psychiatric episodes are of a manic phase, what do you mean by that?

A. They use the word "manic" to describe the excited phase of a mental disorder, where the patient is physically hyper-active, and cannot sit still or stay in one place. He may be walking up and down, throwing his hands, perhaps talking rapidly and excessively and things like that.

Q. What is psychoneurosis, doctor?

A. Psychoneurosis is a functional nervous disease disorder. We cannot find any organic disability. It is a functional disorder of the nervous system by which there is a deviation of the personality from the normal. The patient is excitable and is subject to periods of illusion, alternating with euphoria, depression, restless, and the patient cannot stick to anything very well, any job, continuously, I mean.

Q. What do you mean by psychasthenia?

A. Psychasthenia is one type of psychoneurosis. Personally, I consider it the worst form of psychoneurosis, because it is characterized by obsessions, fears, and phobias. While phobia is a

fear, these obsessions are pretty deep in a personality. They are obsessed to do certain things, if I may use the term "malignant type of psychoneurosis" which yields partly to treatment.

126 Q. Doctor, do those disabilities I have mentioned, these conditions I have asked you here, do they disable all individuals the same way?

A. No; I don't think they do.

Q. What is the disabling effect on an individual?

A. It depends on the individual, on the education of the individual, his age, fixation of the symptoms, his will power, character, and other qualities. It differs with different individuals. We believe that all psychoneurotics do have an unstable nervousness, but there is a difference.

Mr. MILLER. That is all.

Cross-examination by Colonel CRENSHAW:

Q. You were employed to come down and testify in this case, doctor, for your special opinions?

A. Yes, sir.

Q. You know what the case is about?

A. I have some idea. It is an insurance case.

Q. What is your idea about the facts in this case, doctor?

A. About what has been—I know that the man——

Q. I want to know what your information is about the facts of this case. What have you been told?

A. Do you mean the patient himself?

Q. By anybody, plaintiff's counsel, or anybody.

A. Just what he gives me.

Q. What does he give you?

A. He asked me about psychoneurosis.

Q. Just in an abstract way?

A. My opinion as to the condition——

127 Q. Just in an abstract way he asked you about those things?

A. I think he asked some in an abstract way and some concrete.

Q. Didn't he tell you the facts of this case?

A. I talked with him; yes, I did.

Q. You understood that?

A. Yes.

Q. All of your expressions and opinions, with reference to psychoneurosis and psychasthenia, are given with the background and the facts of this case?

A. I was answering him those of what I consider psychoneurosis.

Q. In other words, you know and understand that you can interpret your opinion with reference to psychoneurosis insofar as it would bear on this lawsuit?

A. I don't understand you.

Q. You understand, don't you, doctor, that you have testified in many cases, and you know just about what it takes to make out a case?

A. I assume I do.

Q. In other words, an opinion with reference to psychoneurosis, an abstract, might be a whole lot different from what it might be in a concrete case?

A. Yes.

Q. You do not mean to tell me all psychoneurosis cases are insanity cases, do you?

A. No.

Q. You do not mean to tell me that all psychasthenia
128 cases are insanity cases, do you?

A. No; I didn't mean to tell them that.

Q. In the abstract, you would say it wasn't insanity, would you? If somebody would say here is a case of psychoneurosis, and that is all you know about it, you would not say that is insanity.

A. I consider a person suffering from psychoneurosis is not insane.

Q. As a rule, when you say psychoneurosis you consider that person is not insane?

A. Ordinarily.

Q. The same thing is true of psychasthenia?

A. Yes.

Q. The same thing is true of constitutional psychopathy?

A. Well, I have to draw a line on that.

Q. Do you mean all psychopathic people are insane?

A. No; not insane. I think the infrequency of incompetency is more likely.

Q. What do you mean? Do you mean a person who has some congenital condition? It is congenital, isn't it?

A. That is some people's opinion.

Q. Don't you think so?

A. I think there is a congenital factor in constitutional psychopathy.

Q. Isn't that correct, that all doctors consider psychopathic conditions as being congenital?

A. I think some of them do.

Q. Isn't it the most rare thing on earth if they don't
129 agree?

A. I don't think they know.

Q. Well now, maybe we are getting somewhere. Doctors are quite uncertain what causes and what are the reasons for various and sundry diagnoses they give as far as mental and nervous conditions are concerned?

A. Sometimes.

Q. You would not undertake to diagnose the degree of disability when all you know about the case is that a man has a psychoneurosis?

A. Not the degree.

Q. It might be the most minor sort of degree?

A. It could be.

Q. The same thing is true of psychasthenia, is it not?

A. Well, I told you. I think I have a little different opinion about psychasthenia. I think that is the worst form of psychoneurosis.

Q. What I am asking you is this, If you do not know anything, except what somebody had given a man a diagnosis of psychasthenia, you would not, from that, say he had a major degree?

A. No. I would think it is at least moderate, maybe more.

Q. If you knew a man had a diagnosis of psychopathic inferiority, you would not say that man had a major degree of disability?

A. I would have to know the individual case before I would say that.

Q. Isn't it true of all these cases that you have to
130 know a whole lot more about the matter than just a simple diagnosis of that sort?

A. Yes, I think you should.

Q. In other words, that only means that all of us people, all of us human beings have certain degrees of peculiarities, oddities, conditions which we call psychopathic which we are born with? We do not react exactly normal.

A. We all have our peculiarities and idiosyncrasies, I guess. I would not say we are all psychopaths.

Q. But to find somebody who is exactly normal, even the doctors would be——

A. I do not know whether you can say that. After all, abnormals are determined by the average person who can get along.

Q. Everybody has some idiosyncrasies?

A. Practically everybody.

Q. Those are the things that are usually born in a person—that is, a disposition?

A. You do have inherited tendencies and a good many are developed.

Q. The development part, I suppose, is our reactions from different things which we run into in life?

A. It is a result of the way we are reared and trained.

Q. That is what I mean, reactions we run into in life from troubles, sorrows, and tragedies, which usually produce the symptoms we interpret as a psychopathic condition; isn't that right?

A. I don't know whether I would want to agree totally with that.

131 Q. How would you differ from that?

A. I think most people's patterns are determined by the time they are ten or twelve years old.

Q. It may be determined that he may be odd, peculiar, studious, of a high temper, a calm individual, an inferior individual, that may be determined by the time he is eleven years old?

A. Yes.

Q. But as he goes on and gets more intimately in touch with life the symptoms of that condition will become more obvious?

A. Yes; as the disease ruled.

Q. In other words, you say one person would practically go into hysteria some day?

A. Yes.

Q. And another person may be very quiet and calm about it? That is merely the disposition they are born with?

A. I know it is the disposition they are born with.

Q. Or have accumulated up to that time, we would say?

A. What they are born with and what they developed is determined by what they could do at the moment.

Q. Any time anybody has a disposition along a certain mental line and they come in contact with things that oppose that or conflict with it, it aggravates them?

A. Yes; it does.

Q. When a man becomes forty years old he has had more aggravations than he had when he was twenty years old?

A. He has had more aggravation.

132 Q. That disposition, when he is forty years old, will be more pronounced than when he is twenty?

A. As a rule.

Q. Some people, we will say, meet a tragedy of life very calmly, don't they?

A. Well, we don't know how calmly they meet it. A great many do.

Q. Do you mean some people are able to meet a tragedy of life and conceal their real feelings?

A. Sometimes.

Q. There are other people who run into tragedies of that sort who can not conceal their feelings and make to display that so you can tell?

A. Yes.

Q. With all those psychopathic people, all these people who are inclined with psychoneurosis, when they run into a real tragedy of life, they display a reaction that is more violent than some normal person?

A. We think that.

Q. If you were going to determine a man's disability, or his mental condition, you would not want to take it immediately after he had a tragedy in life, would you?

A. Well, it would not make any difference to me.

Q. It would not make any difference to you?

A. Not particularly.

Q. I thought we just agreed just a moment ago that a man with such a disposition would have a violent reaction immediately after a tragedy?

A. Yes; I agree with you.

Q. You would not want to take that as a test as to what
133 his general condition was, would you?

A. I would be inclined to determine his general condition pretty much from that.

Q. You would want to know whether that lasted, wouldn't you?

A. If I found a person who had become unduly alarmed and upset about an ordinary incident, which the other man would handle fairly calmly, even though I saw him in the excited stage, I would believe he was constitutionally undeveloped mentally, and perhaps an unstable individual, and perhaps psychoneurotic.

Q. Would you say that merely because a man displayed a high temper?

A. If it was of a sufficient degree I certainly consider it an important symptom of that condition.

Q. It is an important symptom? If a man got into an argument, in a fight with somebody else, a man who is possessed of a very high temper, you would not say he was a psychoneurotic?

A. I would be inclined to.

Q. Even though he calmed down and went to his business in the next hour?

A. He should have had better control of it.

Q. All of us ought to have better control.

A. We do, in accordance with the degree of intelligence.

Q. Haven't you a pretty good temper yourself?

A. Oh, yes.

Q. Do you think you are psychoneurosis or psychoneurotic?

134 A. Sometimes I display some symptoms, I think.

Q. That is probably a display of psychasthenia, too, along with it?

A. I would not say psychasthenia. Psychasthenia is more likely an anxiety neurosis.

Q. Don't you ever get anxious about anything?

A. Sure.

Q. Isn't that psychasthenia?

A. No.

Q. Because you do not have any desire?

A. We have very definite obsessions and fears.

Q. You say you have a high temper and that is a sort of psychoneurosis. You say you have anxiety and that is a sign of psychasthenia?

A. I didn't say anxiety is any form of psychasthenia.

Q. You said it was an anxious sort of thing. If, at any rate, you were to run into something terrific tomorrow or the next year you would expect your anxiety to increase somewhat; you would expect your psychoneurotic, your temper, to increase depending upon the circumstances; isn't that right? You are not mad right now, are you?

A. No.

Q. I might go after you in such a degree that you might get mad?

A. I don't know whether you could or not.

Q. If I were to insult you, of course you would get mad?

A. I don't know.

Q. Your psychoneurosis, for the moment, would be
135 greater than it is right now?

A. I would not say that. You can try it if you want.

Q. I wasn't threatening you. In other words, psychoneurosis, and a degree of it, and the same thing is true of psychasthenia, depends sometimes as a more or less temporary proposition insofar as the degree is concerned?

A. I would not call a psychasthenic a temporary disability.

Q. You would not call that a temporary proposition?

A. No; I would not.

Q. In the degree in which it manifests itself?

A. No; because I think that is a permanent condition in a psychoneurotic.

Q. Let us take the question of say tragedy and sorrow. I don't know whether you ever lost your mother or not.

A. I have had some shocks.

Q. Most of us have had. At the moment that occurs you do feel a terrific loss, don't you?

A. Oh, sure.

Q. That depends somewhat upon this anxiety or this reaction which most of us have in varying degrees.

A. I would not say it depended altogether on it. I think every individual, being perfectly normal, if he gets a shock it does affect his nervous system.

Q. And at the moment it happens it has a terrific impact on the nerves and mental reactions?

A. Yes.

Q. As time goes by nature provides us something that calms us down and years later we can think of it with calmness?

A. Time heals somewhat.

Q. So, in that sense of the word, psychoneurosis is temporary in its degree, isn't that right?

A. I don't believe psychoneurosis is a temporary disability.

Q. Do you mean the different things you passed in an exciting occasion in your life has nothing to do with the degree of psychoneurosis you have?

A. It would not, in my estimate, because—of course, at the time of the shock the person would show some symptoms—but fundamentally and basically he would have the same condition he had before.

Q. The only way you can diagnose psychoneurosis and psychasthenia is from manifested symptoms?

A. Well, I would not say that exactly. After you have had experience you almost spot them before you start.

Q. How would you spot them?

A. They don't show the strength of character in their face and different manifestations. You see at a glance other people have more stability; then you go into his symptoms.

Q. Isn't that a manifestation, a symptomatic manifestation, just exactly what you are talking about?

A. Not when determined by objective examination. I mean by that you may walk into the room and draw some impression as you walk in.

Q. You say a man could climb out on that tree and get on a low limb and bark like a monkey and you would know he was crazy?

137 A. He certainly would be exhibiting a rather bizarre conduct.

Q. If an idiot you saw in an insane asylum walked through that door and looked with a vacant stare at things, you do not have to examine him to know he is insane?

A. Sometimes you feel that way about it.

Q. Isn't it true every time?

A. There are people who malingers, you know. We have to eliminate that in a diagnosis.

Q. But for most of us people who go on in life and travel down this path, to discover any evidences of our insanity, you have to make a very careful psychiatric examination, don't you?

A. Yes.

Q. Then, when you doctors find a man who has a nervousness, disabled at the moment, you say he has psychoneurosis, don't you?

A. No; not by itself.

Q. You would not say that by itself?

A. We take it into consideration and go over him carefully, and go into the different ways——

Q. You would examine the Babinski test on him?

A. Yes; we probably would.

Q. When you got through with the Babinski test and you found a positive reaction on it, would you stop right there and say he was crazy?

A. No.

Q. You would have to know a lot more than that?

A. Yes.

138 Q. And that Babinski test might show positive today and next year it might show negative?

A. I think it is a pretty reliable sign.

Q. And that Babinski test might show positive today and next year it might show negative?

A. If you got a real Babinski I would say it would be permanent unless the condition might change. He might not have it next year.

Q. A Babinski test might show positive for temporary excitement?

A. No; I would not say excitement.

Q. Or a temporary nervous condition that had been created by a tragedy of life?

A. No; I don't think so.

Q. It could not be produced by anything except a defective nerve or organic trouble?

A. We consider it a sign of something wrong with the nerve.

Q. Just show us what a Babinski would be.

A. You stroke the bottom of the foot like this [indicating]. The toe ordinarily comes down this way [indicating]. In a Babinski it comes up sort of like a hammer.

Q. In a Babinski you mean if you stroke it up like this [indicating] it comes like that [indicating]?

A. Instead of reflecting it extends; it rears back.

Q. It rears back like this [indicating]?

A. It becomes extended; we mean it is an extension.

Q. That is what the Babinski test is?

A. Just stroke the bottom of your foot.

139 Q. And if your toe turns up you are crazy?

A. No; I would not say that.

Q. Have you tried yourself out?

Mr. MILLER. I object, if your Honor please, to all these questions.

By Colonel CRENSHAW:

Q. What I am trying to get at, Doctor, is that, as a matter of fact, that is a very insignificant indication of a man's mentality. You can not say he is insane on that; you would not say a man was high tempered or insane on that, would you?

A. It depends on his temper. Ordinarily, I would not.

Q. You would not say a man who had been through a terrific experience, with family disturbances, a divorce, and lawsuits, and put in jail for contempt of Court, and threatened with an insane commission, you would not say that a man, immediately after that, should be free from psychoneurosis manifestations, would you, Doctor?

A. I do not think that would determine his psychoneurosis. He would show some nervous symptoms.

Q. Don't you think that is enough for any man to show nervous symptoms?

A. Not necessarily.

Q. That nervous symptoms should ordinarily be temporary?

A. Yes; of that sort.

Q. You would expect a man like that to get over it in time unless something else happened?

A. I would wonder why he got himself in such a position.

140 Q. Suppose you knew, Doctor, after that one examination in which there was a positive Babinski—there was, in fact, a negative Babinski—that would make it doubtful, I think, and that would mean the first one was a temporary proposition, wouldn't it?

A. I wouldn't say that. My conclusion would be that maybe the test, the man that carried the test, I might doubt the kind of test and the conclusion that was drawn rather than saying his Babinski was temporary. Maybe he did not have it in the first place.

Q. You keep saying that I wouldn't say that exactly and I doubt that. You scatter some doubt about these things. Is your doubt and the reason you won't say that have anything to do with the fact that you were in conversation in so far as the nervous and mental condition is concerned before you came down here?

A. That has nothing to do with it.

Q. You do constantly and regularly come down in these cases and testify?

A. Not regularly.

Q. You do constantly come down here?

A. I have been down here five or six times in two years.

Q. Five or six times in less than two years?

A. Not less.

Q. You are paid a fee for it?

A. Yes.

Q. How much fee have you been paid in this case?

A. I haven't got any yet.

Q. It depends on the outcome of this case?

141 A. I wouldn't say that. I have not rendered any fee in this case.

Colonel CRENSHAW. That is all.

Mr. MILLER. That is all, doctor, thank you. May the witness be excused?

The COURT. Yes; he may be excused, Mr. Miller.

(The witness left the stand.)

Mr. MILLER. If your Honor please, I wish to introduce this picture in evidence. It was identified by the defendant in cross-examination. I ask it be marked "Plaintiff's Exhibit Number 3."

Colonel CRENSHAW. We have no objection, your Honor.

The COURT. It may be received.

(The picture referred to, having been previously marked "U. S. Exhibit Number 28" for identification, was thereby marked "Plaintiff's Exhibit Number 3" and received in evidence.)

Mr. MILLER. We shall now continue reading the deposition of Mrs. Marguerite Carlton Blane.

(The reading of the deposition of Mrs. Marguerite Carlton Blane was resumed and the following occurred:)

(Counsel for both sides approached the bench and conferred with the Court in a low tone of voice, as follows:)

Mr. MILLER. The question beginning with, "State whether or not you were apprehensive," and so forth, there is objection to that. It is on page 62. Perhaps your Honor can rule on that.

The COURT. Yes; that may go out. How about this one
142 [indicating]?

Mr. COSTELLO. I had not gotten to that one, your Honor. I don't know just how that reads.

The COURT. The question and answer objected to will go out.

Mr. MILLER. For the information of the jury this period of time is the period of 1932 from the previous question.

(At the conclusion of the foregoing conference, counsel returned to the trial table, and the trial proceeded as follows:)

(The reading of the deposition of Mrs. Marguerite Carlton Blane was resumed.)

Mr. MILLER. We shall now read the deposition of Mrs. Ella C. Levy.

(The deposition of Mrs. Ella C. Levy, a witness on behalf of plaintiffs, taken at Shreveport, Caddo Parish, Louisiana, on the 13th day of March, 1939, in District Courtroom "B," Parish of Caddo, State of Louisiana, before Mrs. John Marshall, Notary Public in and for the Parish of Caddo, State of Louisiana, pursuant to agreement of counsel for plaintiffs and defendant, was read by Mr. Miller and Mr. Costello.)

Mr. MILLER. We shall now read the deposition of Mrs. Carrie M. Henry.

(The deposition of Mrs. Carrie M. Henry, a witness on behalf of the plaintiffs, taken at Shreveport, Caddo Parish, Louisiana, on the 13th day of March, 1939, in District Courtroom "B,"

Parish of Caddo, State of Louisiana, before Mrs. John
142½ Marshall, Notary Public in and for the Parish of Caddo,
State of Louisiana, pursuant to agreement of counsel for
plaintiffs and defendant, was read by Mr. Miller and Mr. Costello, and the following occurred.)

(Counsel for both sides approached the bench and conferred with the Court in a low tone of voice, as follows:)

Mr. COSTELLO. On page 83, in answer to the question, "What was his occupation?" this part of the answer, "but he had not done any work for a long, long time," is not responsive to the question.

The COURT. I think the whole answer may be shown. I think the whole answer should go in as an explanation of what the witness wanted to say.

What about this?

"Question. Is that of your own knowledge?"

"Answer. Yes, I know that he had not."

I think the whole answer is all right.

(At the conclusion of the foregoing conference, counsel returned to the trial table, and the trial proceeded as follows:)

(The reading of the deposition of Mrs. Carrie M. Henry was resumed and completed.)

Mr. MILLER. Will your Honor excuse us just a moment. We are practically through with the plaintiff's case?

The COURT. Yes.

Mr. MILLER. With the exception of introducing one or two documents we are through. I would like to introduce a
143 certified copy of a death certificate of the insured.

(The death certificate of Albert T. Witbeck was marked "Plaintiff's Exhibit 4" and received in evidence.)

Mr. MILLER. The death certificate which is offered in evidence is for the purpose of proving the death which occurred on December 1, 1933.

The claim of the insurance made and the denial have been covered by stipulation, if your Honor please. That was covered at the beginning of the case.

The COURT. My recollection is that it was.

Mr. MILLER. Under the circumstances, the plaintiff rests.

The COURT. The jury may be excused. I will ask you to be back at 1:30, please.

(The jury withdrew from the courtroom.)

MOTION FOR DIRECTED VERDICT IN FAVOR OF THE DEFENDANT

Colonel CRENSHAW: Comes the defendant at the close of the plaintiff's testimony and moves the Court to direct a verdict for the defendant on the ground that the plaintiff has failed to make out a prima facie case for the jury; that the plaintiff's own evidence shows only a man who was temporarily upset on account of a divorce case and a family disturbance, and that all the evidence so far in this case does not prove total and permanent disability.

There is nothing in the testimony of the doctors, for instance, and especially in view of Dr. Guynn's testimony, that would indicate that this man, at any time prior to his death, was suffering with any kind of mental or nervous condition which was shown to be permanent in character. In fact, I think Dr. Guynn's testimony showed there was no permanency of any possible condition he had.

Of course, we are faced in this case with the question of his death within a short time after the lapse of his insurance, but his death was caused by an intervening disability of acute appendicitis, rupture, and death in two or three days time. It is quite obvious the effort here is merely to bridge that gap. I do not know whether your Honor has seen this picture which the plaintiff has introduced. There is the man, himself, which I think is mighty good evidence for the defense.

The COURT. I think it is a case for the jury. The motion will be denied.

Colonel CRENSHAW. Your Honor, I wish to state that perhaps some of these details will be more clearly covered in the defense's testimony. I think there is considerable difference in the aspect that goes at the close of the plaintiff's and the close of the defendant's testimony.

The COURT. Yes, we will look into that at that time. The Court stands adjourned until 1:30.

(Thereupon at 12:30 o'clock p. m. a recess was taken until 1:30 o'clock p. m. of the same day.)

145

EVIDENCE ON BEHALF OF THE DEFENDANT

Mr. COSTELLO. At this time, your Honor, we would like to present certain excerpts of the Commissioner's summary. This is the Commissioner's summary, which Mr. Miller explained to you, and is a compilation of all the medical evidence in the case. He read certain parts and now the defendant will read certain parts the defendant needs.

(Mr. Costello read to the jury as follows:)

"Report of physical examination of Albert Tyler Witbeck at New Orleans, Louisiana. Report dated June 26, 1925. Said report shows:

Physical Examination: Lungs: Palpation negative. Percussion: Slight impairment first rib up. Auscultation negative. Conclusion: Negative.

Report signed: L. J. GENELLA,
A. M. O. E. V. B."

"Report of neuropsychiatric examination of Albert Tyler Witbeck at New Orleans, Louisiana. Report dated November 28, 1928. Said report shows:

Mental Examination: 6/25/25. Clear and oriented in all spheres without neurosis, psychosis or psychoneurosis existing at this examination.

146 "11/28/28. Gives no definite symptomatic N. P. syndrome which would lead me to diagnose him as having neurosis, psychosis or psychoneurosis. There is a constitutional psychopathic coloring which no doubt is inherited and at times is handled badly. He is however relevant, deferential at this examination and is without neurosis, psychosis or psychoneurosis.

N. P. diagnosis: Deafness right?

No mental or nervous disease.

Prognosis: Good from N. P. standpoint.

Is claimant bedridden? No. Do you advise hospital care? No. In your opinion, is it advisable that claimant resume his former occupation? Yes, and is. Is he competent? Yes.

Report signed: WALTER J. OTIS, M. D.,

Chief N. P. Unit."

"Report of physical examination of Albert Tyler Witbeck at Diagnostic Center, U. S. Veterans Hospital, Washington, D. C. Report dated January 25, 1929. Said report shows:

"Patient is a white male adult, stocky physique, well nourished, and well developed. No evidence of pain in expression. Quiet during examination. Excessively cooperative. Complexion is fair.

147 "Nervous System: Superficial and deep reflexes are present and about average in activity. No unsteadiness in the Romberg position. No kernig or Babinski signs noted. No ankle clonus. No tremors. No disturbance of volitional control or cutaneous sensations.

Report signed: W. CAREY MELOY, M. D.,

Reception Service."

"Report of Consultant in Internal Medicine on Albert Tyler Witbeck at Diagnostic Center, U. S. Veterans Hospital, Washington, D. C. Report dated, February 8, 1929. Said report shows:

"Diagnoses: 1. No pulmonary disease (except slight pleuritic adhesions at left costo-phrenic angle.) 2. No cardiac disease.

Recommendations:

Report signed: J. D. THOMAS, M. D.,

Consultant in Internal Medicine."

"Report of Consultant in Internal Medicine on Albert Tyler Witbeck at Diagnostic Center, U. S. Veterans Hospital, Washington, D. C. Report dated, February 14, 1929. Said report shows:

Veteran is well developed and well nourished."

"Report of Consultant in Neuropsychiatry on Albert Tyler Witbeck at Diagnostic Center, U. S. Veterans Hospital, Washington, D. C. Report dated, February 20, 1929.

148 Said report shows:"

Mr. MILLER. I read that whole report.

Mr. COSTELLO. That is right.

"Report of Laboratory Findings on Albert Tyler Witbeck while at Diagnostic Center, U. S. Veterans Hospital, Washington, D. C., by Dr. B. S. Levine, on February 25, 1929. Said report shows:

"Sputum: Negative for blood. Negative for tubercle bacilli."

Mr. MILLER. I read practically this examination.

"Remarks: Hospitalization advised with appropriate psychotherapy for mental condition chiefly. Competent. Can travel alone."

Colonel CRENSHAW. If your Honor please, we would like to offer in evidence the decision of the Supreme Court of the State of Louisiana, rendered on March 30, 1931, rehearing denied on April 27, 1931, in the case of Witbeck versus Hughes et al., which has reference to the coroner's deposition in the record the coroner had. This is reported in the Southern Reporter, 134, on page 255, which, I judge, the Court will consider as an official record.

The COURT. How does that have relation to the coroner's report?

Colonel CRENSHAW. It is a decision by the Supreme Court in reference to this coroner's testimony. This is a decision of the Supreme Court on the very question which the coroner undertook to testify to. I would like to show it to you, your

149 Honor.

The COURT. Show it to Mr. Miller, first.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. MILLER. This is apparently a suit brought by Witbeck against Hughes and others. I do not know who the others are.

Colonel CRENSHAW. It involves the ruling of this coroner.

Mr. MILLER. At least it is not the parties in this case and to this present action. I don't know who Hughes is.

The COURT. What do you claim for it?

Colonel CRENSHAW. We have had the testimony of this coroner who produces his records, including the testimony with

reference to this man's insanity. This is a suit which went to the Supreme Court in which they say here and held what the coroner had said, and all that shows that the man was not crazy; in other words, if the coroner's record is admissible I submit the Supreme Court's decision of Louisiana is admissible.

Mr. MILLER. We do not know what testimony was before the Court in that case.

Colonel CRENSHAW. We do know what was before the coroner.

The COURT. The effect of Mr. Miller's objection is that it can not be res judicata because this plaintiff was not party to the cause.

Mr. MILLER. The basis of my objection is that this comes under no exception to the hearsay rule, if your Honor please.

150 Colonel CRENSHAW. We have allowed the testimony of the coroner who has interpreted the situation to suit himself and introduced his records in here, and yet here is the Supreme Court in the State of Louisiana in which the suit was brought, in which the Supreme Court says that based on that coroner's report he is not insane. The coroner's report shows he is not insane. That is attacking the credibility of the coroner's report. This shows the dates that Albert Tyler Witbeck, the insured, was engaging in this litigation. The introduction of it is for the purpose of showing he had that litigation at that time and it indicates an activity.

Mr. MILLER. You mean, if he brings a suit that is evidence he is not totally and permanently disabled?

Colonel CRENSHAW. Yes. I have three or four more I am going to offer along the same lines. I offer this one particularly because it does deal with the testimony of the coroner, and here is the Supreme Court who says the coroner's report shows the man was not crazy.

The COURT. I will sustain Mr. Miller's objection; however, with respect to the offer which you now make, to show that litigation was pending and decided on this date to which he was a party, may be shown. If Mr. Miller will stipulate as to those matters there will be occasion then to produce the records.

Mr. MILLER. I will stipulate there was a suit in that Court on that date to which Mr. Witbeck was a party plaintiff and Hughes and others were parties defendants.

Colonel CRENSHAW. Then your Honor would exclude that part of it with respect to the coroner's report?

151 The COURT. Yes; I sustain Mr. Miller's objection to that.

Colonel CRENSHAW. I think in these other reports which

I would like to offer in the same way, to show first, that he was engaging in this litigation on the dates shown; secondly, I want to show one of them was a divorce suit and one of them was a transaction against him for contempt of Court for taking his child out of the state, in which the Supreme Court held he was not guilty of it, guilty of no contempt. There was one decree which determined that the child be given possession to the mother.

The COURT. I think that all may be shown by stipulation excepting the decision. You can cover that all by stipulation by saying that on March 30, 1931, there was pending in the Supreme Court of Louisiana this case entitled Witbeck against Hughes et al., which was a rehearing to set aside a previous decision to annul a divorce decree. The grounds for the annulment of that decree were temporary insanity, which the plaintiff, himself, alleged was a reason—

Colonel CRENSHAW. For setting aside that verdict. The Court held that the coroner's report shows he was not incompetent and insane and the Supreme Court held that too.

The COURT. I shall permit you to show that the litigation is pending, and the nature of the litigation, without indicating the result by decision, not for the purpose of showing his activities in that regard at the time you mention.

Colonel CRENSHAW. How about the ground of his petition? He based the whole thing on the ground that he was temporarily deranged. That was his petition he filed in the lower
152 Court to set aside a divorce decree. The Court refused to accept it because the Court said the coroner's report, who examined him at the time, shows he was not insane.

The COURT. I think as far as you should go would be to say that this was a rehearing.

Colonel CRENSHAW. A petition to set aside a previous judgment of a divorce decree?

The COURT. Yes. In the other cases you can tell what the proceeding was without excluding the result.

Colonel CRENSHAW. How about the one, your Honor, in which the Court decreed a child would be turned over to the mother?

The COURT. My ruling would be the same, but not to show the actual date. That will show his activities except whether he was successful or unsuccessful.

(At the conclusion of the foregoing conference, counsel returned to the trial table, and the trial proceeded as follows:)

Colonel CRENSHAW. As I understand your Honor's ruling now, we may offer the opinion of the case in the Southern Reporter, 134, page 255, the fact that there was pending before the Supreme

Court of Louisiana this case, decided on March 30th, 1931, a rehearing denied on April 27, 1931, the case of Witbeck versus Hughes et al., which involved a petition by Mr. Witbeck, the insured in this case, to set aside or nullify a divorce decree?

The COURT. Yes; I think that fairly showed it. It may be received. It will be understood, however, that the opinion in the case is not in evidence.

Colonel CRENSHAW. May we offer for the record, with
153 the objection sustained by the Court, the opinion of the Court and the conclusion reached therein?

The COURT. Yes. To that, Mr. Miller objects, and the Court sustains the objection.

Colonel CRENSHAW. Then, we offer the record as reported in the Southern Reporter, 129, of the case of Witbeck against Witbeck, which was decided by the Supreme Court of Louisiana June 2nd, 1930, with a rehearing denied on July 2nd, 1930, which is a suit by Mrs. M. B. Witbeck against Albert T. Witbeck for a decree of separation for board and bread and the defendant appealed. We offer the rest of the decision subject to the objection which was made just for the record.

The COURT. And the last offer is objected to by Mr. Miller and the objection is sustained.

Colonel CRENSHAW. We offer from the Southern Reporter, 141, page 871, the case of Witbeck versus Witbeck, which was heard in the Supreme Court of Louisiana April 25th, 1932, and appealed from the First District Court, Parish of Caddo, the suit by Mrs. M. B. Witbeck versus Albert T. Witbeck. From a judgment dismissing the suit the plaintiff appealed. We offer in connection with that the opinion of the Court, which your Honor has sustained the objection to.

The COURT. Mr. Miller objects to the opinion and the Court sustains the objection.

Colonel CRENSHAW. Then, we offer from number 127, Southern Reporter, page 888, the case of Witbeck versus Witbeck, from the Supreme Court of Louisiana, decided on March 31, 1930, which is a divorce suit by Mrs. M. B. Witbeck versus Albert T. Witbeck to review a decree.

154 The COURT. That may be received.

Colonel CRENSHAW. The alternative writ of prohibition was made peremptory and was involved in it, and we offer the whole decision, subject to the objection of Mr. Miller, which the Court has sustained.

The COURT. Mr. Miller objects to the opinion and the Court sustains the objection.

Colonel CRENSHAW. We offer from the Southern Reporter, 143, page 712, the official report of the case of Witbeck versus Witbeck in the Supreme Court of Louisiana, decided on July 20th, 1932, rehearing denied on October 4, 1932, suit by Mrs. M. B. Witbeck versus Albert T. Witbeck from a decree for the plaintiff. The defendant appealed and we offer the remaining portion of the Court's opinion and ruling subject to Mr. Miller's objection and the Court's sustaining thereon.

The COURT. Mr. Miller objects to the opinion and the decision and the Court sustains that objection.

Mr. COSTELLO. At this time, your Honor, the defense would like to read certain depositions taken in this case. I may say, for the benefit of the jury, these are depositions taken by the Government in the defense of this case.

The COURT. When were they taken?

Mr. COSTELLO. We were taken on the 14th day of March at Shreveport, Louisiana.

The COURT. You may proceed.

Mr. COSTELLO. Mr. Miller and I will now read the deposition of Dr. J. M. Gorton.

(The deposition of Dr. J. M. Gorton, a witness on behalf
155 of the defendant, taken at Shreveport, Caddo Parish, Louisiana, on the 14th day of March 1939, in the offices of the respective parties, between the hours of 10:00 o'clock a. m., and 3:00 o'clock p. m., before Mrs. C. B. Fleming, Notary Public in and for the Parish of Caddo, State of Louisiana, pursuant to agreement of counsel for plaintiffs and defendant, was read by Mr. Costello and Mr. Miller and the following occurred.)

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. MILLER. I object to the question on page 10 which is, "Question. Then, Doctor, did you, yourself, consider Mr. Witbeck capable of performing some occupation?"

Mr. COSTELLO. Your Honor, the doctor is stating his opinion on professional treatment and also knowing the man for a period of years. Under those conditions he is capable of giving an opinion.

The COURT. I will take the answer.

Mr. MILLER. I object to the question in the middle of pages 11 and 12.

Mr. COSTELLO. These are the same type of questions you have previously ruled on as to the opinion that the man was able to work. I think his opinion is competent.

The COURT. It may be taken with the exception of the matter I have indicated there on page 12.

(At the conclusion of the foregoing conference, counsel returned to the trial table and the trial proceeded as follows:)

(The reading of the deposition of Dr. J. M. Gorton 156 was resumed and concluded.)

Mr. COSTELLO. We will now read deposition of Mr. E. Wayles Browne.

(The deposition of Mr. E. Wayles Browne, a witness on behalf of defendant, taken at Shreveport, Caddo Parish, Louisiana, on the 14th day of March, 1939, in the offices of the respective parties, between the hours of 10:00 o'clock a. m., and 3:00 o'clock p. m., before Mrs. C. B. Fleming, Notary Public in and for the Parish of Caddo, State of Louisiana, pursuant to agreement of counsel for plaintiffs and defendant, was read by Mr. Costello and Mr. Miller and the following occurred.)

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. MILLER. The testimony that has just been read, at page 27, the questions and answers there are relating to the year 1933. That is a typographical error. It was in June, 1932, according to other testimony we had. Do you want to tell the jury, your Honor?

Mr. COSTELLO. I think Mr. Miller is right.

The COURT. Suppose you do that.

(At the conclusion of the foregoing conference, counsel returned to the trial table, and the trial proceeded as follows:)

Mr. MILLER. With his Honor's permission, I just wanted to state that there is apparently a typographical error in this record with respect to the year 1933; that this testifying in the Federal Court was being done on June 12th, 1932. We verified it from the other record.

157 The COURT. The Government agrees it is 1932?

Mr. COSTELLO. The Government makes no objection.

(The reading of the deposition was resumed and the following occurred.)

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. MILLER. I have objection to the first question and answer on page 29. I can not make out what this means. First it says one thing and then it says something else.

The COURT. I think it may be read. Let the jury make it out as they can.

Colonel CRENSHAW. May we interrupt the deposition to call Dr. Foxwell?

The COURT. Yes.

Thereupon RAYMOND K. FOXWELL was called as a witness and, having been first duly sworn, was examined and testified as follows:

158 Direct examination by Colonel CRENSHAW:

Q. What is your residence, and occupation, and state in connection with that your connection with the United States Government, if any, where you obtained your medical education, and any special qualifications you have or specialty you practiced?

A. My name is Raymond K. Foxwell. I graduated from the University of Maryland in 1916; my internship was at Pittsburgh; I was assistant superintendent of the State Hospital for the Insane for one year; I was a medical officer in the United States Army; chief of the section of nervous and mental diseases at a base hospital; assistant psychiatrist in the Department of Public Welfare in the State of Illinois in Chicago; since residing in Washington I have been practicing on nervous and mental diseases at the Georgetown and George Washington Universities.

Q. Do you have any connection with the Government?

A. For the past nine years I have been consultant of diseases in the Diagnostic Center.

Q. Did you know Albert T. Witbeck in his lifetime? Do you have any recollection of him?

A. No.

Q. Have you any records to disclose as to whether or not you ever examined him?

A. I have a report of examination I made at Mount Alto.

Q. Please examine your report and refresh your recollection, if necessary. Is that what you have in your hand, doctor, the original report?

159 A. Yes, sir.

Q. You signed it?

A. Yes.

Q. Do you recognize the fact that you examined him?

A. I do.

Q. What was the date of that?

A. February 20th, 1929.

Q. What did you find as a result of that examination?

A. I made a diagnosis of psychoneurosis, psychasthenia moderate.

Q. Interpret that for us, doctor, in the degree of disability with respect to the effect it might have upon his capacity to engage in some occupation and what effect engaging in an occupation might have.

A. Psychoneurosis is a general term that is used to mean nervousness in four degrees, mild, moderate, severe, and pronounced. The mild means nervousness, hardly noticeable; moderate is slightly more than that; a severe degree means still worse, and pronounced means a very bad condition.

Q. What effect, if any, would that condition have upon his capacity to engage in an occupation?

A. The moderate degree would have very little effect on his ability.

Q. And the severe degree would have more effect, would it?

A. That is correct.

Q. And the pronounced degree would have still more than that?

A. That is correct.

160 Q. In other words, from your examination, doctor, was there any reason why he should not engage in an occupation at that time?

A. There was no reason why he should not.

Q. Would work have been good or bad for him?

A. Good for him.

Q. Did you have a record or did you have before you the history which he gave of his case at the time?

A. Yes.

Q. Did you check that over with him?

A. That is routine.

Q. Do you have that history before you?

A. Yes.

Q. Will you refer to it and read any part of that history which he gave at the time that you consider has any bearing on his case? Read it all if necessary.

A. You mean, all of my examination?

Q. Yes; just a minute. It is already in, doctor. I was trying to get it into evidence. We won't have you read it over. I understand Mr. Miller has read it.

Mr. MILLER. Yes; I read it all into evidence.

By Colonel CRENSHAW:

Q. Did you take a Babinski on him in your examination?

A. Yes.

Q. What did you find?

A. There was no Babinski at the time I made the examination.

Q. What is the meaning of it if it happened to be a positive Babinski?

161 A. It means it is a symptom of one of many organic diseases of the central nervous system and spinal cord.

Q. Does it sometimes come temporarily and disappear? Could it be produced by something else?

A. The interpretation of it varies a great deal by different physicians. It is done by stroking the sole of the foot. The toes are supposed to turn down when you do that. If they turn up and spread apart that is a Babinski. It is sometimes called a defense action if the patient is very ticklish.

Q. It might be interpreted as a Babinski?

A. Yes.

Q. In an indifferent examination?

A. Yes.

Q. From the fact that he may have had a Babinski at one time before this time and he did not have it then, what does that indicate?

A. At the time of this examination he had no evidence of any organic disease of the central nervous system.

Q. Was he mentally competent or not?

A. He was mentally competent.

Colonel CRENSHAW. All right, you may inquire.

Cross-examination by Mr. MILLER:

Q. When was that examination, doctor?

A. That is February 20th, 1929.

Q. Doctor, you have no opinion as to how disabled he was in 1932, have you?

162 A. No.

Mr. MILLER. No questions.

Colonel CRENSHAW. All right, that is all.

(The witness left the stand.)

(The reading of the deposition of Mr. E. Wayles Browne was resumed and completed.)

Mr. COSTELLO. We will now read the deposition of Mr. F. E. Lacaze.

(The deposition of Mr. F. E. Lacaze, a witness on behalf of the defendant, taken at Shreveport, Caddo Parish, Louisiana, on the 14th day of March, 1939, in the offices of the respective parties, between the hours of 10:00 o'clock a. m., and 3:00 o'clock p. m., before Mrs. C. B. Fleming, Notary Public in and for the Parish of Caddo, State of Louisiana, pursuant to agreement of

counsel for plaintiffs and defendant, was read by Mr. Costello and Mr. Miller and was completed.)

Mr. COSTELLO. We will now read the deposition of Mr. R. O. Roy.

(The deposition of Mr. R. O. Roy, a witness on behalf of the defendant, taken at Shreveport, Caddo Parish, Louisiana, on the 14th day of March, 1939, in the offices of the respective parties, between the hours of 10:00 o'clock a. m., and 3:00 o'clock p. m., before Mrs. C. B. Fleming, Notary Public in and for the Parish of Caddo, State of Louisiana, pursuant to agreement of counsel for plaintiffs and defendant, was read by Mr. Costello and Mr. Miller up to the cross-examination when the following occurred.)

163 (The reading of the deposition of Mr. R. O. Roy was resumed and completed.)

164 *Transcript of proceedings—Volume 3*

Filed November 1, 1939

The trial of the above-entitled cause was resumed before Associate Justice F. Dickinson Letts and the jury heretofore impaneled therein in Civil Court Number 1 at 10:00 o'clock a. m., pursuant to adjournment on yesterday.

Appearances: On behalf of Plaintiffs: Warren E. Miller. On behalf of Defendant: Colonel Allen Crenshaw, James B. Costello, George M. Fay.

PROCEEDINGS

Mr. COSTELLO. At this time, your Honor, I would like to continue with the depositions.

The COURT. Very well.

165 Mr. COSTELLO. This is the deposition of John E. Heard, taken by the Government at the same time and place you heard yesterday.

(The deposition of John E. Heard, taken pursuant to notice annexed to the deposition and stipulation between counsel as therein contained at Room 412, Federal Building, Shreveport, Louisiana, on the 21st day of March, A. D. 1939, at 2:30 p. m., before Mrs. C. B. Fleming, Notary Public, after the said witness was sworn to tell the truth, the whole truth, and nothing but the truth, was read by Mr. Costello and Mr. Miller, and the following occurred.)

Mr. MILLER. We are willing to waive the cross-examination of about ten pages unless they want it.

The COURT. Well, you have the privilege to do so.

Colonel CRENSHAW. I do not think we will insist on it, your Honor. It will save time, anyway.

The COURT. Very well.

(The reading of the deposition of John E. Heard was resumed and completed.)

Mr. COSTELLO. At this time, your Honor, I would like to read the report of Dr. Gorton, and examination made of Albert Tyler Witbeck by Dr. Gorton, on August 24, 1933.

"DR. J. MARION GORTON,
Shreveport, La., August 24th, 1933.

166 "This is to certify that I have this day examined, Albert T. Witbeck, Shreveport, La. and find the following:

Physical signs.

Inspection—Rather large robust male. Has a chronic slightly productive constant cough. Chest is large and somewhat rounded and expansion somewhat limited.

Palpation. Increased fremitus over the lower surface of lungs anterior and posterior.

Percussion. Increased resonance over upper portions and somewhat dull over the lower parts of lungs.

Auscultation. Breath sounds are audible over all the lung front and back. There is a wheezing over the upper portions with musical notes under scapula each side. Breath sounds are lessened over the lower portions of lung.

Diagnosis. Chronic Bronchitis diffuse. Moderate emphysema."

Mr. COSTELLO. These are additional depositions taken by the Government in Shreveport. They are the depositions of Mrs. John Marshall and Dr. W. S. Kerlin which were taken on March 25th, 1939.

(The deposition of Mrs. John Marshall, a witness on behalf of defendant, taken at Shreveport, Louisiana, at the office of Assistant United States District Attorney, Malcolm E. LaFargue, on the 25th day of March, A. D. 1939, between the hours of 1:00 and 3:00 o'clock p. m., before Mrs. C. B. Fleming, Notary Public in and for the Parish of Caddo, State of Louisiana, pursuant to agreement of counsel for plaintiffs and defendant and as shown by notice attached to the deposition was read by Mr.
167 Costello and completed.)

Mr. MILLER. There was a stipulation entered into by counsel to the effect that the notes were certified to by the re-

porter and sent here were a true and correct transcript, but there was no consent to the admissibility of the record in the stipulation.

Mr. COSTELLO. At this time, your Honor, we would like to offer the official transcript of record of Albert Tyler Witbeck in the case of A. J. Broderick and George Calvert versus Sabine Lumber Company and introduce it in evidence.

Mr. MILLER. How many pages is that?

Mr. COSTELLO. There are twenty-three pages.

Mr. MILLER. If your Honor please, about twenty-three pages of testimony is being offered in a case that was tried in Louisiana in the District Court, in which the parties are not the same as the parties in the present case, and I believe, under Section 1065 of our Code it is inadmissible and I object to its admission in evidence.

Mr. COSTELLO. Your Honor, this testimony was the testimony of the deceased veteran, Albert Tyler Witbeck, and these are the official reporter's notes.

The COURT. It is not a personal transaction.

Colonel CRENSHAW. We offer it, your Honor, simply as an indication which the jury can observe, and the Court can find from the testimony itself the mental capacity of the man at the time.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

168 Mr. MILLER. I assign as my reasons for the objection the following: The testimony of the insured Albert Tyler Witbeck in the Federal Court in Shreveport is not admissible in the instant case.

To admit the testimony of witnesses on a former trial, the parties must be the same. *Fresh v. Gilson*, 41 U. S. (16 Pet.) 327, 10 L. Ed. 982, reversing (Cr. Ct. 1838) 5 Cranch, C. C. (5 D. C.) 533, Fed. Cas. No. 5, 112.

"In order to warrant the reception of evidence given at a former trial it must appear that the parties to the later trial are, either actually or constructively, the same * * *." 22 C. J. Evidence Par. 513.

Section 1065 of the Code of Laws of the District of Columbia (32 St. 540 C. A. 1329) provides:

"Section 1065. Testimony of Deceased or Insane Party.—If a party, after having testified at a time when he was competent to do so, shall die or become insane or otherwise incapable of testifying, his testimony may be given in evidence in any trial or hearing in relation to *the same subject-matter between the same*

parties or their legal representatives, as the case may be; and in such case the opposite party may testify in opposition thereto." [Italics supplied.]

Similarly, the testimony of the insured in the Court in Louisiana is incompetent in the present case.

The COURT. Very well, objection overruled. I think, perhaps, I should explain this to the jury.

(At the conclusion of the foregoing conference, counsel
169 returned to the trial table, and the trial proceeded as follows:)

The COURT. I say to the jury that the evidence is shown by the transcript which is now about to be read to you is not given to you for your consideration as to the truth or the importance of any of the things testified to by the deceased, but only that you may weigh it in connection with all of the evidence in the case as bearing upon the mental condition of the deceased on September 1st, 1932, if you find that it does have any such bearing and his activities at that time, during the time the testimony was taken.

Mr. MILLER. In view of the fact that these are not questions and answers in this case, it will be perfectly all right for Mr. Costello to read the twenty-three pages himself.

The COURT. Yes, I think so.

Mr. COSTELLO. This is the testimony of Albert Tyler Witbeck given on June 16, 1932.

(The testimony of Albert Tyler Witbeck in the case of A. J. Broderick and George Calvert versus Sabine Lumber Company was read to the jury by Mr. Costello.)

Mr. MILLER. The testimony of the insured in the Court in Louisiana is incompetent in the present case.

Thereupon WALLACE D. BROCK was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct examination by Colonel CRENSHAW:

Q. What is your occupation?

A. I am the bursar of the American Council of Learned
170 Societies.

Q. Where is your residence?

A. Washington, D. C.

Q. Does the Society to which you refer maintain offices in the City of Washington?

A. We do.

Q. What business do they engage in?

A. Administrative research work.

Q. Are you the custodian of the records?

A. I am.

Q. Do you have any records of that organization pertaining to one Albert Tyler Witbeck?

A. I do.

Q. Will you produce those, please?

A. [Handing the records to Colonel Crenshaw.]

Q. Are these the records of this organization that you spoke of?

A. They are.

Q. Please refer to this, will you, Mr. Brock, and inform us just what the connection and what association your organization had with Mr. Witbeck [handing a paper to the witness].

A. I have here a letter from the Editor of the Dictionary of American Biography to Mr. Witbeck under date of March 7, 1929, asking Mr. Witbeck to write an article for the Dictionary of American Biography on Thomas Freeman. Mr. Witbeck accepted under date of March 8, 1929, agreeing to write such article for the Dictionary.

Q. Is that acceptance by Mr. Witbeck in the form of a letter?
171

A. It is.

Q. Dated March 8, 1929?

A. Yes, sir.

Q. And it bears his signature here [indicating].

A. It does. That is a contract card which he has signed agreeing to write an article of five hundred words.

Q. What is the date of that?

A. March 8, 1929; and we paid Mr. Witbeck ten dollars for that article.

Q. On what date was the check made out?

A. The check is made out to Mr. Witbeck and endorsed by him May 31, 1929.

Colonel CRENSHAW. We offer this in evidence.

(The papers referred to were marked "Defendant's Exhibit Number 32," and received in evidence.)

The WITNESS. Mr. Witbeck was also asking to write an article on John Sibley under date of May 31st, 1929. Mr. Witbeck signed a card saying that he would do so on May 3rd, 1929, and he was paid by check on September 30th, 1929.

Q. In what amount?

A. Ten dollars.

Q. Made out to A. T. Witbeck?

A. Made out to A. T. Witbeck and endorsed by him.

Colonel CRENSHAW. I offer that in evidence.

(The papers referred to were marked "Defendant's Exhibit Number 33," and received in evidence.)

By Colonel CRENSHAW:

172 Q. Is this a letter taken from your files [handing the letter to the witness]?

A. It is a letter taken from the files of the Dictionary of American Biography.

Q. Addressed to Dr. Allen Johnson, Editor-in-chief, Dictionary of American Biography, 608 Hill Building, Washington, D. C., signed by A. T. Witbeck?

A. It is.

Q. Is that the reply [handing a paper to the witness]?

A. This is the reply from Dr. Johnson.

Q. Where is Dr. Johnson?

A. Dr. Johnson is dead.

Colonel CRENSHAW. I offer this in evidence.

(Letter dated September 8, 1929, and the reply thereto, dated September 11, 1929, were marked "Defendant's Exhibit Number 34," and received in evidence.)

By Colonel CRENSHAW:

Q. And what is this letter here [indicating]?

A. It is a letter from Witbeck to Dr. Malone, who succeeded Dr. Johnson as the Editor of the Dictionary.

Q. What is the date of that?

A. The date is May 27, 1931.

Q. It has reference to this transaction?

A. It has reference to the article.

Q. This is a letter signed by Witbeck?

A. Signed by A. T. Witbeck.

Colonel CRENSHAW. I offer that in evidence.

(The letter dated May 27, 1931, was marked "Defendant's Exhibit Number 35," and received in evidence.)

173 By Colonel CRENSHAW:

Q. What else do you have?

A. We have an article which Mr. Witbeck wrote, about five hundred words or so, and there were various notes which the editors made in connection with it.

Q. Is there any way to identify the signature of Mr. Witbeck?

A. There is no signature, just initials, A. T. W.

By Mr. MILLER:

Q. What was the date of that?

A. The article is not dated. The editor acknowledged it on April 27, 1929. I don't believe there is anything else.

Colonel CRENSHAW. I do not think we have any purpose to offer that. That is all.

Cross examination by Mr. MILLER:

Q. This last five hundred word article on April 27, 1929, how much money did he get for that?

A. Ten dollars.

Q. So, altogether he received thirty dollars for writing articles; that is all the money he received, to your knowledge?

A. To my knowledge, yes; just two ten dollar checks.

By Colonel CRENSHAW:

Q. Thirty dollars, wasn't it?

A. Just two ten dollar checks.

By Mr. MILLER:

Q. One was Thomas Freeman?

174 A. And the other one was John Sibley.

Mr. MILLER. That is all, no questions.

By Colonel CRENSHAW:

Q. Just one minute. Was that the regular fee paid for that type of article?

A. Yes, sir.

By Mr. MILLER:

Q. Just one other question. Did your organization think these were sufficiently valuable to have copyrighted?

A. The Dictionary was copyrighted—twenty volumes published by the Council and Charles Scribner & Son.

By Colonel CRENSHAW:

Q. It was not copyrighted in Mr. Witbeck's name?

A. It was copyrighted in the name of The American Council Of Learned Societies.

Q. Were the articles published in that Dictionary?

A. Yes; a considerable number.

By Mr. MILLER:

Q. You mean just two for Mr. Witbeck?

A. Yes.

Mr. MILLER. That is all.

(The witness left the stand.)

Mr. COSTELLO. At this time we would like to proceed with further depositions.

Mr. MILLER. Your Honor, I think we can save a little time.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

175 Mr. MILLER. With reference to page 6, the fourth question, and the rest of the deposition with reference to the testimony of Dr. Kerlin, objection is made on the ground that it violates Section 1073, D. C. Code, which I have here for your Honor. That is all testimony of the doctor showing his examination and his opinion based on it.

The COURT. That he was Witbeck's physician?

Mr. MILLER. Yes.

He was there for the purpose of examination. The previous testimony will show he went there for an examination.

Mr. COSTELLO. Your Honor, Dr. Gorton's deposition was read under the same conditions and no objection was offered. This man knew him in both a social and professional way.

Mr. MILLER. My objection is based on the ground that it violates the D. C. Code.

Mr. COSTELLO. Anyway, your Honor, he can certainly express an opinion as to the man's mental condition, because he was associated with him for years in the American Legion or otherwise.

The COURT. The statute closes his mouth as to confidential information received by virtue—

Mr. COSTELLO. He only examined him on one occasion. He has known the man since the date of discharge and knew him socially.

Mr. MILLER. I am not objecting to any part of the deposition prior to question 4. On page 6 all parts which relate to the facts he obtained in an official capacity are not admissible, together with his opinion.

176 The COURT. Yes; the ruling can be waived by the administrator.

Mr. COSTELLO. Couldn't mental competency be procured as a result of special contact?

The COURT. Are there any questions that indicate that his opinion would not have reference to their confidential information?

Mr. COSTELLO. I believe so, your Honor.

Mr. MILLER. I don't believe so.

Mr. COSTELLO. He states three statements, your Honor, wherein he states he only examined the man on one occasion prior to

October 1933, and I think some of these other statements just relate to the social contacts with him.

The COURT. It would be quite natural that he would take into consideration his examination and would base his opinion in part upon that examination. I think he is an incompetent witness if he is allowed to express any opinion at all, unless it be fairly shown that his answer has no relation whatever to information received by him in a professional capacity.

Mr. COSTELLO. You could not rule on all the remaining questions there.

Colonel CRENSHAW. I think he says as far as mental capacity is concerned he never examined him for that. He made other contacts with him.

The COURT. Even so, take the matter of common knowledge. He could take into consideration the appearance of the subject.

Colonel CRENSHAW. This man saw him in Legion meetings.

The COURT. He might be competent to give his opinion if he excluded from his consideration, in coming to that opinion, all matters of information which were received in confidence;
177 in other words, it would be a fair inference that he is basing an opinion on his whole observation including his examination.

Colonel CRENSHAW. Your Honor, in that connection, there was no objection made at the time of taking the deposition, which has given us an opportunity to qualify him on that basis. It seems to me to make the objection now would be too late, unless it was made then.

The COURT. He reserves the right to make objections here.

Colonel CRENSHAW. If an objection was made at the time of the taking of the deposition we could have gone back and excluded all questions as to the information he obtained on the examination. We now have no opportunity of doing that. That is an objection to the form.

The COURT. I will sustain the objection to such parts as directly, or by implication, call for an opinion based on information received in confidence.

Colonel CRENSHAW. There is one other thing, your Honor. Right here he says on page 6,

"Question. That was Government compensation?"

"Answer. Government compensation, insurance."

It was in connection with the government compensation matter, according to his own statement.

Mr. MILLER. You would have to show he was employed by the Government.

Colonel CRENSHAW. I think he would have to show this man went to him, as a private physician, for treatment.

The COURT. Not necessarily for treatment.

Colonel CRENSHAW. In private practice for some purpose pertaining to private matters.

The COURT. For some purpose of the patient.

Colonel CRENSHAW. This shows he went to him to get some examination.

The COURT. He did not receive this information by virtue of his representation of the Government, did he, because this fellow picked him out and went to him? Section 1073 of the D. C. Code states:

"In the courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representatives, to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity."

Colonel CRENSHAW. Your Honor, this is not any such case as that. He attaches to it his statement which he made and swore to and evidently was submitted to the Veterans' Bureau and shows official filing, which removed it from a confidential nature.

The COURT. You are entitled to use the record from the Veterans' Bureau, of course.

Colonel CRENSHAW. He disclosed nothing confidential in character.

The COURT. This was addressed to Witbeck and was by Witbeck filed with the Veterans' Bureau. That was a disclosure by Witbeck of the matters that are shown in this communication, and is not a disclosure of anything else in my judgment.

Colonel CRENSHAW. This is not a disclosure of his testimony of anything confidential. Here is the only thing in reference to the examination he talks about in this record. He says he did not examine this man for a mental condition; that he saw him in Legion meetings, and that he saw him on the street and talked to him numbers of times.

The COURT. He made this examination. All doctors say they watch the patient's eyes and take little things into consideration.

Colonel CRENSHAW. He obviously did not tell that in this examination. This doctor refers to something—

The COURT. I do not think that is so limited in the knowledge or information which he requires. Suppose he strips the fellow off and acquires information that has not been divulged to him at all?

Colonel CRENSHAW. Suppose, by that practice, the man was suffering from gonorrhea. That is confidential information which should not be disclosed.

The COURT. Everything he finds by reason of the employment is confidential. He can not go out in the street and tell it.

Colonel CRENSHAW. Do we close the mouth of a doctor even though he has seen him hundreds of times without observation and examination?

The COURT. It might be a different question if he were asked for information exclusive of information received confidentially.

I take it that there is no such question.

180 Colonel CRENSHAW. I think we should have had that opportunity to examine this man on that basis. I think it would be justifiable to ask the Court to continue the case so that we can take the testimony of that man.

The COURT. I do not know how much of this deposition is subject to that objection.

Colonel CRENSHAW. For instance, your Honor, would it be objectionable to say he examined him on a certain date without disclosing what date?

The COURT. He can tell that, but he can not disclose any information he found.

Colonel CRENSHAW. How about the information on the report?

The COURT. He gives that information to Witbeck and Witbeck filed it with the Veterans' Bureau, and this doctor identifies that as a report of his examination. That is not a disclosure by the doctor; it is a disclosure by Witbeck.

Colonel CRENSHAW. Would that be admissible on that basis?

The COURT. Yes; that may be received.

Colonel CRENSHAW. What does he object to, then?

The COURT. He objects to the testimony of the doctor. This is admissible because it is part of the record.

Colonel CRENSHAW. The doctor said over here that he examined him on a certain date and the doctor identifies it then. On that basis we are going to exclude all the rest of his testimony? I would have to object to it piece-meal.

The COURT. Everything is admissible except the confidence.

181 Colonel CRENSHAW. I am trying to find out what the confidential matters are.

The COURT. I can only tell them when I hear the questions.

Colonel CRENSHAW [reading]:

"Question. Just state when that was, if you recall, and what type examination you made of the veteran.

Answer. My records show it was October 4, 1933.

Question. What kind of examination did you make?

Answer. That was a physical examination for disability insurance, for either increasing it or reinstating it, I forget which.

Question. That was government compensation?

Answer. Government compensation, insurance."

Is that admissible?

The COURT. It is admissible.

Colonel CRENSHAW. Would agreement number 3 be admissible?

The COURT. Yes.

Mr. MILLER. The admissibility of the statements of private doctors made to the insured and sent by the insured to the Veterans' Administration, that is a change in the procedure heretofore followed. As I understand it, it has been the policy in the past without exception—and this would be the first exception to that, if your Honor is letting this in—that a statement by a private doctor contained in the Veterans' Administration's records is admissible in evidence in and of itself. Heretofore it has been only the statement of government doctors made in the course of their regular employment, as a record, just for the record in this case. I guess there is no use of making any objection.

The COURT. When Witbeck, the patient, filed it with the Veterans' Bureau, he waives the privilege. It becomes admissible, not by reason of the testimony of this witness, but by reason of the fact that it is in the record of the Veterans' Administration. I do not see why anything which is filed in the Veteran's Administration by Witbeck is not competent evidence.

Colonel CRENSHAW. The admissibility of the record is based on two or three different things. First, it is a record kept by the Government; second, it is a record made by Government employees. That is what takes it out of the hearsay rule.

The COURT. If Witbeck, during his lifetime, received that letter and filed it with the Veterans' Administration, thereby waiving the privilege, why can't you pick it up and review the actions of this plaintiff by showing what Witbeck himself did in his lifetime?

Colonel CRENSHAW. The only way I can identify this, and I can not do it, is to say that Dr. Kerlin was a Government doctor.

The COURT. He is not. Nobody contends he was.

Colonel CRENSHAW. Where it is filed by Witbeck and the doctor says that is my report because that man himself disclosed this by filing it with the Veterans' Bureau and the doctor identifies his signature?

The COURT. You say there is no way to prove that?

Colonel CRENSHAW. I may prove that by Dr. Kerlin.

183 The COURT. That means during the examination somebody handed that to him and asked him if it was his letter.

He could not testify Witbeck sent that to the Veterans' Administration.

Colonel CRENSHAW. The doctor could not do that. I do not know whether your Honor has seen enough of it or not to recognize this stamp as being a Veterans' Administration stamp.

The COURT. Would there be any doubt that that was filed with the Veterans' Administration?

Mr. MILLER. I have no doubt that it was filed with the Veterans' Administration.

Colonel CRENSHAW. Is it your Honor's ruling that this statement is admissible in this testimony?

The COURT. I think it is.

Mr. MILLER. I will admit it was taken from the Veterans' Bureau files, but nothing else.

Colonel CRENSHAW. These other questions here about what he complained of and what he found in this examination are all out. Now, he has an opinion on page 8. I understand that is ruled out?

The COURT. Yes.

Mr. MILLER. The last question would be all right.

Colonel CRENSHAW (reading the last question on page 8):

"During your association with him in the Legion meetings would Mr. Witbeck, or rather did Mr. Witbeck ever take part in the proceedings?"

That is admissible, is it?

The COURT. Yes.

Colonel CRENSHAW (reading the first question and answer on page 9):

184 "At those times would he have anything to say, or just explain what type of activities he became involved in?"

"He was always rather aggressive and constructive in his criticisms and suggestions, very intelligent."

The COURT. Is there any objection to that?

Mr. MILLER. No objection.

Colonel CRENSHAW (reading questions and answers on page 9):

"Question. Was he rational or irrational in what he talked about?"

"Answer. I considered him rational."

"Question. That was your opinion as a doctor?

"Answer. Yes; I thought he was rather decided in his opinions, still I would consider him very rational.

"Question. Did he conduct himself properly or improperly?

"Answer. Properly on these occasions that I saw him.

"Question. Did he appear to be a well educated man or not?

"Answer. Yes.

"Question. What have you to say about his mentality, either as being good or bad?

"Answer. I thought it was very good.

"Question. Other than being high-strung, would you say that there was anything in your opinion that would convey to you as a doctor, knowing him as you did both from your examination and your personal contact, that he was suffering from any mental or physical disorder?

"Answer. I would not think so."

Mr. MILLER. I object to the last question and answer on page 9.

The COURT. It may go out.

Colonel CRENSHAW (reading questions and answers on page 10):

"Question. Doctor, did you make a neuropsychiatric examination of Mr. Witbeck?

"Answer. No; I did not.

"Question. Are you a specialist in psychiatry?

"Answer. No; I apply it in my practice, I don't specialize in it.

"Question. Did you ever make an examination of that nature?

"Answer. Yes—

"Question. Of Mr. Witbeck?

"Answer. No; not Mr. Witbeck."

Mr. MILLER. I will waive the whole cross-examination.

Colonel CRENSHAW. I wanted to show the background if he made any neuropsychiatric examination.

I would like the last question on page 10 and the first answer on page 11 to go in, which read:

"Question. You didn't make any findings at all in your examination as to his mental condition?

"Answer. No."

The COURT. I think that may be so.

(Colonel Crenshaw marked different questions and answers, some of which were admitted and some of which were left out of the deposition of Dr. W. S. Kerlin.)

The COURT. Let the record show that the Court's ruling is a general one; that the Court has not read the questions and answers which have been reviewed by counsel; that it is deemed that they have agreed that the questions and answers which are excluded in the reading are such as properly come within the scope of the Court's ruling.

(At the conclusion of the foregoing conference, counsel returned to the trial table, and the trial proceeded as follows:)

The COURT. We shall take a five-minute recess.

(Thereupon there was a brief informal recess, at the conclusion of which the proceedings were resumed as follows:)

The COURT. Very well, you may proceed.

Mr. COSTELLO. This is the deposition of Dr. W. S. Kerlin, which I shall now read to you.

(The deposition of Dr. W. S. Kerlin, a witness on behalf of the defendant, taken at Shreveport, Louisiana, at the office of Assistant United States District Attorney Malcolm E. Lafargue, on the 25th day of March, A. D. 1939, between the hours of one and three o'clock p. m., before Mrs. C. B. Fleming, Notary Public in and for Caddo Parish, Louisiana, pursuant to agreement of counsel for plaintiff and defendant, and as shown by the notice hereto attached, was read by Mr. Costello and concluded.)

Mr. COSTELLO. Defendant's Exhibit Number 30 is the report of the physical examination which is introduced in evidence at this time, by Dr. W. S. Kerlin. The examination is dated October 13, 1933.

187 "Mr. A. T. WITBECK,

Shreveport, La.

DEAR MR. WITBECK: Following is memorandum of examination of Mr. A. T. Witbeck, age 51, 343 College St., Shreveport, La.

Complaint: Bronchitis resulting from gas poisoning. Substernal pain. His cough is moderately productive, particularly in the morning. Shortness of breath on exertion. Substernal pain increased on exertion but the pain is more troublesome at night. He describes it as if something were pressing against his sternum.

Examination: Blood pressure 139/100. There was moderately limited expansion over both lung fields. The note was rather emphysematous over both lung fields. There were no audible rales in the lungs. The chest on full inspiration measured 40 inches, on expiration 37½ inches. With a suggestive history of angina I deemed it advisable to make an electrocardiographic tracing which revealed changes that were suggestive of mild myo-

cardial involvement. The change noted was a slurring of the QRS complex in the first and second leads but there was no change in the T waves.

The suggestive history of anginal attacks with the electrocardiographic findings is indicative of beginning myocardial damage."

188 Mr. COSTELLO. At this time, your Honor, we would like to introduce an exhibit which was introduced by the plaintiff, but only partly read. It is the death certificate which is dated December 4, 1933.

"Place of death, Parish—Caddo, City of Shreveport, Louisiana. Full name—Albert T. Witbeck. The cause of death was as follows: Acute appendicitis, ruptured—chronic bronchitis. Uremia. Contributory cause—Acute peritonitis."

This report is signed by Dr. J. C. Willis, Jr.

At this time I would like to introduce in evidence Defendant's Exhibit Number 25, which reads as follows:

"Albert T. Witbeck, 1610 Creswell Street, Shreveport, La.," and it is addressed to, "Mr. B. C. Moore, Regional Manager, U. S. Veterans Bureau, New Orleans, La."—

Mr. MILLER. Are these all being offered in evidence, or have they been offered?

Mr. COSTELLO. They are being offered now.

Mr. MILLER. Would you mind letting me look at them a minute? I have not seen them. They were just identified by the witnesses. I have no objection to Number 25.

Mr. COSTELLO. I shall now read it.

189 "DEAR SIR: I am in receipt of your 2d notice to report for reexamination to your office in New Orleans. (Form 2507-B.)

Kindly refer to my letter of January 14th in which I stated that it would be impossible for me to remain in New Orleans more than one day (from about 9 A. M. until 8 P. M.), to which communication no reply has been received as yet.

The transportation sent me is herewith returned as having expired. I have held it patiently awaiting your reply to that letter. It is my desire to cooperate as far as possible with the Bureau, but I cannot abandon my work and wait around New Orleans two or three days to have an examination made which ordinarily does not take an hour. I abandoned a position paying \$350 per month once at the insistent behest of the Federal Board for Vocational Education to receive \$145.00 and fooled around for 17 months and never received the course applied for, which could ordinarily have

been received in 30 days or less, and I have no intention of again losing needful work, to sit around cooling my heels unless it is definitely understood in advance how long I am going to be away.

I have had previous examinations in New Orleans, which was completed within an hour and a half.

Yours very truly,

(Signed) A. T. WITBECK."

The COURT. What was the date of that?

Mr. COSTELLO. March 2, 1925, your Honor.

Mr. MILLER. I have no objection to Number 26.

190 Mr. COSTELLO. Being introduced in evidence at this time is the report dated February 7, 1930.

Witbeck, Albert T.—C-253,423

"UNITED STATES VETERANS BUREAU.

Mint Building, New Orleans, La.

GENTLEMEN: Kindly send me blank application to file claim for hospital pay while at Mt. Alto under observation last year. (Sec. 203, WWVA.)

The exigencies of the situation required that I put in a claim on the 26th of February last year for what was the due, and for which I was paid up to and including Feb. 21st, 1929. Accounting Classification (§ M H-R 21-0695—10A.). The amount received at that time was \$84.80 covering period from Jan. 20 to Feb. 21 (but not including the latter date. Division according to Standard form No. 1034 a. was 12 days in Jan. at \$2.65 per day, \$31.80; 20 days in Feb. at \$2.65 per day, \$53.00 or a total of \$84.80.

According to the affidavits or depositions of Drs. Victor Aimone, Medical Officer in Charge, Dr. Goode, Neuropsychiatrist, and Foxwell, of which your office has copies, my period of observation was from January 22, 1929, to May 16, 1929, both inclusive. To this period should be added the two days necessary in returning to Shreveport, where I arrived May 18, 1929. The deposition of Dr. Foxwell shows that the hospital records record this period of observation.

191 "I have endeavored to get along without making application for this amount, but the present situation is such that it is absolutely necessary that I do so.

Yours very truly,

(Signed) A. T. WITBECK."

Mr. COSTELLO. I would like to introduce in evidence at this time U. S. Exhibit Number 24.

Mr. MILLER. There is no objection to any of these being introduced in evidence.

Mr. COSTELLO. This is a long, lengthy letter, your Honor. There are only certain excerpts I would like to read from it.

The COURT. You may do that, and if Mr. Miller wants to read anything he may do so.

Mr. MILLER. I have nothing else to read on this.

Mr. COSTELLO. The part of this letter which I am particularly interested in is this:

"The mental trouble that I had, notwithstanding the doctors' diagnosis, I have worked out of and now no longer have.

"I thank you for your consideration and also for your past indulgence."

Mr. MILLER. There is no objection to any of this.

Mr. COSTELLO. At this time I would like to introduce Defendant's Exhibits Numbers 7 to 23, inclusive. These are applications which were made for reinstatement of insurance. This was a technical lapse, but not an actual lapse, so I will pass these along and you can look these over collectively.

191-a Defendant's Exhibits 7 to 23, Incl.

Counsel have agreed that the only material parts or facts shown in these exhibits are as follows:

Each of these seventeen exhibits consist of an application for reinstatement of insurance, signed by A. T. Witbeck, on Form 744 of the United States Veterans' Bureau, in each of which application statement was made by the applicant that he was not, on the dates involved, permanently and totally disabled, and that each application represents an application to reinstate either all or a part of the insurance involved in this suit; that the dates of these applications were as follows: May 31, 1932; April 27, 1932; February 27, 1932; November 5, 1931; October 31, 1931; September 30, 1931; August 31, 1931; May 30, 1931; February 26, 1931; January 30, 1931; March 30, 1930; August 26, 1929; July 19, 1929; May 15, 1929; July 31, 1928; July 3, 1928; June 28, 1927.

192 Defendant's Exhibit Number 1, which is in the matter of Albert Tyler Witbeck, is an affidavit signed by the beneficiary, Ella T. Witbeck. This affidavit was received in the Veterans' Administration on July 30, 1936, and reads as follows:

Colonel CRENSHAW. I am willing to withdraw that unless Mr. Miller wants it.

Mr. MILLER. No; I don't want it.

Mr. COSTELLO. Defendant's Exhibit Number 29 is a Civil Service application which is made out by Albert Tyler Witbeck, which is dated 5/2/31. This application sets forth his training and experience. Under his training the following data is noted, "Mental derangement? No. Nervous exhaustion? No."

In this report the deceased veteran stated that he had been employed from the date of discharge, about 1900 to 1931, at a salary of \$375 a month, sometimes averaging ten thousand dollars a year. He sets forth the various places where he had been employed, which include numerous engineering projects, also his historical research work and things of that nature.

Mr. MILLER. What is the date of that, Mr. Costello?

Mr. COSTELLO. The date of that is 5/2/31; approved 9/11/31.

Defendant's Exhibit Number 27 is a Civil Service application filled out by the deceased insured, Albert Tyler Witbeck, at Shreveport, Louisiana, dated September 26, 1933. This report was for an examination for civil engineering and construction. In this examination he refers back to the application which I am just passing around now [handing to the jury].

Mr. MILLER. May I see that just a minute? I do not believe I have had a chance to look that over.

193 Mr. COSTELLO. This is a civil service application dated September 26, 1933, filled out by the deceased insured and contains the following information: It says that he had been an engineer up to 1931 and since 1931, from May, 1931, to September, 1933, he was employed as an engineer, and he was making thirty-five hundred dollars a year. I call your attention to the picture therein.

Defendant's Exhibit Number 3, which is being introduced in evidence at this time, is Veterans' Administration Form 579, dated April 16, 1936.

Colonel CRENSHAW. I think you can leave that out, too.

Mr. COSTELLO. I have certain portions of this I would like to show the jury. This report contains a complete industrial history.

Defendant's Exhibit Number 5, dated November 8, 1933, is the "Claimant's appeal to Administrator of Veterans' Affairs." It says, "Give details below as to alleged mistakes of fact or error of law in last rating of claim. Failure to consider that influenza and bronchitis are very similar when of the bronchial or breathing portion of the body."

The COURT. What was the number of that exhibit, the industrial exhibit?

Mr. COSTELLO. That was Exhibit Number 3.

Defendant's Exhibit Number 4 is an application for retirement pay, which is dated July 7, 1928.

Defendant's Exhibits Numbers 32, 33, 34, and 35 have relation to his work and historical research for the American Council of Learned Societies, and are now introduced in evidence.

193-a

DEFENDANT'S EXHIBIT No. 5

A part of Veterans' Administration Form P-9, Claimant's Appeal to Administrator of Veterans' Affairs, signed by Albert T. Witbeck, and dated November 2, 1933, the following portion thereof being copied and submitted by agreement of counsel as the only material part needed on this appeal:

"Failure to consider that influenza and bronchitis are very similar when of the bronchial or breathing portion of the body. It is believed that the folder shows, or that army records, easily obtainable by the Veterans' Administration, show of my appointment and service as Intelligence Officer covering the Gas Experiment Station and that part of my duties were at that point. That during the period of such duties, gas was liberated, either in experiment or by accident, and that it is a commonly known fact that as a result of this liberation of poison gases, that many men were gassed the same as I was and that the records of Walter Reed will show the same."

193-b

DEFENDANT'S EXHIBIT No. 32

Consisting of four papers—1, letter signed by A. T. Witbeck, dated March 8, 1929, addressed to Professor Allen Johnson, copy attached, together with copy of reply from Professor Johnson, dated March 7, 1929, copy attached; 2, receipt signed by Albert T. Witbeck, dated March 8, 1929, addressed to Editor of the Dictionary of American Biography, Washington, D. C., acknowledging receipt of letter of instructions and agreement to prepare for the Dictionary, an article of 500 words on Thomas Freeman; and 3, check marked paid, in the sum of \$10.00 to the order of A. T. Witbeck from the Treasurer of the Dictionary of American Biography.

193-c

"MARCH 7, 1929."

ALBERT T. WITBECK, *Esq.*,
2650 Wisconsin Avenue, Washington, D. C.

DEAR MR. WITBECK: Following our conversation this morning, I am writing to ask if you would have time and inclination to contribute an article on Thomas Freeman (c. 1806), explorer of Southwest, to our Dictionary? The article should contain not more than 500 words, and honorarium, following the uniform rate which we have adopted, would be \$10. I should like to have this article by May 1, 1929. I am enclosing with this letter a card which I will ask you to sign and return. Acceptance of any article and payment for it will vest all rights to it in the American Council of Learned Societies for publication or otherwise. It gives me great pleasure to have you as a contributor to the Dictionary.

Very truly yours,"

193-d

A. T. WITBECK,
1610 CRESWELL STREET, SHREVEPORT, LA.,
"March 8, 1929."

Professor ALLEN JOHNSON,
602 Hill Bldg., Washington, D. C.

DEAR PROFESSOR JOHNSON: I am returning herewith the card, duly signed, covering Thomas Freeman.

Should the article as submitted be satisfactory will be glad to take Dr. John Sibley and any others within the province of my investigations, in addition to going over Miss Pfaff's article on Henry Miller Slueve.

I feel that it is an honor to be included among the contributors to the Dictionary.

Yours very truly,

H. T. WITBECK."

193-e

DEFENDANT'S EXHIBIT 33

Consisting of four papers:

1. Form receipt, signed by A. T. Witbeck, May 3, 1929, to the Editor of the Dictionary of American Biography, Washington, D. C., acknowledging instructions and agreement to prepare for the Dictionary an article of 500 words on John Sibley, together with a check from the Treasurer of the American Biography, payable to A. T. Witbeck, and marked paid.

193-f

DEFENDANT'S EXHIBIT 34

Copy of a letter signed by A. T. Witbeck, addressed to Dr. Allen Johnson, Editor in Chief, Dictionary of American Biography, Washington, D. C., dated September 8, 1929, and a copy of the reply of Professor Johnson, dated September 11, 1929:

"Dr. ALLEN JOHNSON,

*Editor-in-chief, Dictionary of American Biography,
608 Hill Building, Washington, D. C.*

MY DEAR DR. JOHNSON: I am enclosing the biography of John Sibley which you authorized me to prepare for the "Dictionary." I have tried to get the exact date of his death, but have been unsuccessful so far. This accounts for most of the delay.

Some of Dr. Sibley's descendants here have many of his letters, but they decline to allow them to be seen, the claim being that they contain much intimate family matters. Dr. Dunbar Towland, of Jackson, Mississippi, has in his custody many letters from him to Sir William Dunbar and others but I am reliably informed that he will not permit them to be used on account of his projected history of the life of Dunbar. These letters are I understand the property of the Mississippi Historical Society, and in consequence of the information received did not attempt to ask to see them.

I trust that the biography as written will be satisfactory. The Library of Congress has printed copy of the Caddo vocabulary of which I have the photostatic copy. Unfortunately, I was unable to find it while in Washington, nor does my copy give an indication of what document the copy was taken from.

With kindest regards and best wishes, I am

Yours very truly,

(S) A. T. WITBECK."

SEPTEMBER 11, 1929.

ALBERT T. WITBECK, Esq.,

P. O. Box 1602, Shreveport, La.

DEAR MR. WITBECK: I appreciate very much the article which you have sent in on Dr. John Sibley. As it will be a long time before we reach that part of our work, you may have an opportunity to see some of the letters to which you allude. Possibly by that time Dr. Rowland will have brought out his life of Dunbar. Of course we can add to your article any information that you happen upon. Many thanks for your help."

193-h

DEFENDANT'S EXHIBIT No. 35

Copy of letter signed by Albert T. Witbeck, dated May 27, 1931, addressed to Dr. Dumas Malone, Editor-in-chief, Washington, D. C.

"DEAR SIR: Referring to the biography of Dr. John Sibley which Dr. Johnson commissioned me to write a year or so ago, I have at last discovered the date of his death. Even the tombstone over his grave at Natchitoches is marked simply as "A Revolutionary Soldier," without name or dates.

He was born May 19th, 1757, and died at Natchitoches, (plantation at Grande Ecore on Red River, 4 miles away) on the 8th of April, 1837.

This information was contained in a letter from Major George C. Sibley, of St. Louis, to a relative, a copy of which is in the possession of Hon. G. P. Whittington of Alexandria, La."

193-i

DEFENDANT'S EXHIBIT 24

The following copy of a part of a letter, dated May 27, 1933, at Shreveport, Louisiana, signed Albert T. Witbeck, and addressed to General Frank T. Hines, Administrator, Washington, D. C., which is agreed by counsel, is material to the issue on this appeal:

"Continually, I have been warned by the Bureau's physicians, not to take up my pre-war occupation of civil engineer as it would be dangerous. Repeatedly, they have certified to a vocational handicap. Dr. L. C. Ecker, the Bureau's consultant in lung and respiratory diseases at Mt. Alto, certifies under date of February 20, 1929, that I "must not be exposed to inclement weather." Personally he told me that if I got my feet wet, it might cause complications which would result fatally. My engineering work was practically all out of doors. Repeatedly forbidden from doing the work for which I had given a life study, forced me to abandon this work and endeavor to make a living at something else. Constantly eating into my little store of savings, together with a seeming mental trouble, and having given up my position as Chief Engineer, for Potter Palmer Oil and Gas interests, now the United Gas Corporation. Then as my money dwindled, I attempted to secure vocational training which had been authorized. After 17 months I voluntarily abandoned the pay of \$145.00 per month which I was receiving, the government not having been

able to negotiate the desired course in that time, and which I could have gotten myself if they had let me, in 10 days.

Then, on top of that, I lost my wife and boy, although I have recovered the latter. Then, I had to give up all of my insurance, being unable to pay the premiums, on account of the load I was carrying. Last month, I lost the last of my property through foreclosure, and my boy and I are living in a garage apartment. In addition, I have been obliged to support my mother living in a distant city. Now, under the ruling sent out by the Bureau, I am to lose my pay, because another opinion has disconnected my disability. Possibly with the information contained herein, I may be again connected with the service.

General, this is a pretty long letter, but I wanted to put the matter up to your sense of justice. Even President Roosevelt knows of the confidential nature of the employment when he was Assistant Secretary of the Navy, as I, in the performance of my duty visited his residence and consulted with him. Others include Major Henry Pratt, late Superintendent of Police of Washington, Captain Joseph Manning, who I understand is now in charge of the Narcotic Division of the Department of Justice. However, if I could locate a position which would assure me of a sufficient income to live decently, I would not want any retirement pay and would be perfectly willing to release any claim on it that I might have.

The mental trouble that I had, notwithstanding the doctors diagnosis, I have worked out of and now no longer have.

I thank you for your consideration and also for your past indulgence."

At this time, your Honor, we would like to offer in evidence Defendant's Exhibit Number 30. Do you have any objection to the record of retirement pay, Mr. Miller?

Mr. MILLER. What is the purpose of it?

Mr. COSTELLO. To show his income.

Mr. MILLER. No objection.

Mr. COSTELLO. Members of the jury, in connection with those Civil Service applications, I do not want to leave a false impression. He was never appointed to one of those positions, but he does state he was employed and made ten thousand dollars a year.

Colonel CRENSHAW. The Government closes, your Honor.

Mr. MILLER. If your Honor please, we offer in evidence a certificate under the seal of the Register of Copyrights in the Copyright Office here in Washington. I ask that it be marked Plaintiff's Exhibit Number 5.

(The paper referred to was marked "Plaintiff's Exhibit Number 5" and received in evidence.)

Mr. MILLER. At this time I would like to read it.

Colonel CRENSHAW. There is no objection.

Mr. MILLER [reading]:

"This is to certify that a careful search in the Copyright Office Book indices fails to disclose any registrations in the name of Albert T. Witbeck, as copyright owner, from 1919 to date.

"In Witness Whereof the seal of this Office has been affixed this twenty-eighth day of March, 1939."

The COURT. We will give the jury an opportunity to see all the papers. Has Exhibit Number 3 come around yet?

195 Mr. COSTELLO. No; it has not, your Honor.

Mr. MILLER. I may want to call one witness. There is certain evidence I want to look at after the jury is through with the exhibits. I will withdraw my closing of the case, your Honor.

The COURT. Very well.

Mr. COSTELLO. This is the exhibit you asked to see, your Honor, Exhibit Number 3.

The COURT. Mr. Miller, you say you have another witness?

Mr. MILLER. Yes; if your Honor please.

The COURT. The jury will be back at 1:30.

(Thereupon at 12:30 o'clock p. m. a recess was taken until 1:30 o'clock p. m. of the same day.)

196

AFTER RECESS

(The proceedings were resumed at 1:30 o'clock p. m. at the expiration of the recess.)

The COURT. You may proceed.

Thereupon WILLIAM WITBECK was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Further direct examination by Mr. MILLER:

Q. Mr. Witbeck, you were living with your father from May, 1931, until September, 1933, were you, or what period of that time?

A. August, 1931.

Q. You were living with him from August, 1931. Just tell us in your own words what your home surroundings were there—that is, what was the situation existing in 1933 with respect to your general home surroundings?

A. Well, it was very poor surroundings. We hardly had enough to eat. He only had one suit of clothes and I had a suit. The only clothes he had were old clothes that were worn out. There was just a general room which was a combination office and bedroom and living room and everything else.

Q. The time after you left your home and was sent to live in this one room over the garage, what was the general situation after you went to live over the garage there?

A. It was all crowded up. I don't know exactly what you mean.

197 Q. I mean, did you have plenty of clothes and plenty to eat?

A. No, sir; lot of times we had to do without breakfast, and most of the mornings for breakfast we did have orange juice and we didn't eat anything else. As I said before, he had only one suit of clothes and a lot of times he would have to stay in all day while I got that cleaned.

Q. Do you mean he had old clothes—

Colonel CRENSHAW. We object to the suggestion.

The WITNESS. He didn't have an overcoat.

By Mr. MILLER:

Q. Did he smoke?

A. No; he had to give up smoking altogether.

Q. About when was that he gave up smoking?

A. Around January, 1933.

Mr. MILLER. That is all.

Further cross examination by Colonel CRENSHAW:

Q. Where were you in January, 1933?

A. In Shreveport.

Q. He had smoked up until that time? Why did he stop in January?

A. The money ran out.

Q. Did you know how much money he was getting in 1933?

A. I didn't know.

Q. None at all?

A. I don't know.

Q. You don't know. Do you know how much he was
198 getting at any time?

A. I did, sometimes.

Q. What do you know about his getting money?

A. I knew he received a pension.

Q. How much was it?

A. I don't know. I know it wasn't much.

Q. What would you call much?

A. Fifty or sixty dollars a month.

Q. He was not getting sixty dollars a month when he stopped smoking?

A. I wouldn't say.

Q. Do you know?

A. I said I didn't know.

Q. But you know he stopped smoking because he didn't have any money to buy cigarettes?

A. That is right.

Q. You did not know he was getting \$165 a month in January?

A. I didn't know.

Q. You did not know he was getting that much money, did you?

A. No.

Q. How much rent did he pay for his apartment?

A. I don't know that either.

Q. You did not know that he drew in retirement pay, covering the period from July 3rd, 1928, over twelve thousand dollars, did you?

A. No, sir.

Q. You did not know he was paid a check on November 199 1st, 1930, for thirty-three hundred dollars at one time, did you?

A. No, sir.

Q. You did not know that on July 1st, 1932, he was paid \$1,361.25 for fees?

A. No, sir.

Q. Still, you say, he did not have any clothes or anything to eat?

A. Yes, sir.

Colonel CRENSHAW. All right.

Mr. MILLER. That is all.

(The witness left the stand.)

The COURT. Is that all, Mr. Miller?

Mr. MILLER. That is all, if your Honor please.

The COURT. Very well.

Mr. MILLER. I believe I better read into evidence this compensation data Colonel Crenshaw has been talking about. This is the emergency office retirement benefits from the period of July 1, 1932, to March 31, 1933, \$151.25; April 1, 1933, to June 30th, 1933, \$140.25; from July 1st, 1933, through August 31, 1933, \$9.00 a month; from July 1st, 1933, through August 31, 1933, \$22.50; and from September 1, 1933, through October 31, 1933, \$22.50 a month.

That was the compensation from the Government. That is all. The plaintiff rests.

The COURT. The jury may be excused for a few minutes. (The jury withdrew from the courtroom.)

200 MOTION FOR DIRECTED VERDICT IN FAVOR OF THE DEFENDANT

Colonel CRENSHAW. Comes the defendant at the close of all the testimony and moves the Court to direct a verdict for the defendant on the ground that all the evidence in the case shows clearly that the insured, Albert Tyler Witbeck, was not permanently and totally disabled at any time while insurance was in force. Secondly, on the ground that all the evidence in the case shows that the insured, Albert Tyler Witbeck, some eight or nine months after the lapse of the insurance, died because of an acute attack of appendicitis, having died three days after the operation, from which there could be no connection between that and the date of lapse of the insurance. Third, there is no testimony here, except that with reference to a little mental incompetency of the insured, as that time prior to the date of the lapse of his insurance, could by any consideration judged to be a permanent and total disability. Fourth, on the ground that all the evidence here clearly and obviously shows that the insured, Albert Tyler Witbeck, was not mentally incompetent on the date of the lapse of the insurance or prior thereto or after that. I think there is nothing for the jury to consider.

In connection with that, your Honor, I would like to say this: I think every question of possible cause or reason for permanent and total disability in this case has been eliminated except one; secondly, except the possibility, far-fetched possibility, the way I see it. The second one, there is no question, I think, of what the appendix proposition would be completely removed. There is nothing here to indicate a bronchitis. There is some evi-
201 dence here of a nervous condition. I think, though, there is no doctor or individual—even Dr. Guynn on the stand explained the nervous condition on the basis that certainly would eliminate that from being a possible cause of permanent total disability.

I think the only question involved is a question that might be considered taking the case to the jury is the mental incompetency of the insured on those dates. When we reach that point we have this testimony. We have the testimony of the coroner. If your Honor takes the testimony of Dr. Butler, he reached no final diag-

nosis, but he did give a diagnosis of constitutional inferiority, which was explained by Dr. Foxwell and Dr. Guynn, certainly not being a major and total disability. That does not carry with it the inference that he was mentally incompetent. This doctor did go ahead on some basis. I say, your Honor, to consider in this connection that he said he thought he was irrational. Probably from his testimony one might say he was incompetent. He based that on statements which I would classify as statements coming from a wife who was seeking a divorce and seeking possibly everything she could.

There were tales told to the coroner about something which happened before that time and which were presented as hearsay evidence. I do not think that there is any question on that in my mind. The Court overruled me on that. If I am correct in that viewpoint, that that sort of testimony is hearsay, then that testimony would not be admissible from the doctor as to his opinion about his rationality or mentality. At any rate, the doctor reaching all his conclusions finally wound up by saying he
202 was not a specialist and wanted the man put under observation. It was alleged and he was put under observation by the Diagnostic Center and the result shows that they found him to be competent.

I say, there is only one thing the plaintiff can hope to get to the jury and that will be through the testimony of a few lay witnesses. It was not the wife, because she has not testified; it was not the mother; she has not said that, and it was not the son, but some of the neighbors have interpreted some things which I think, in themselves, the items which they have related in connection with that testimony as a basis for their conclusions, that the man was irrational or incompetent are so absurd and so ridiculous and inefficient when it comes to proving a mental incompetence. Unless they do, I can see nothing in the case that can take it to the jury. I do not think they do from the statements made by the plaintiff himself and from the various rights which he has in his file, they so completely refute any possible apprehension that the man is totally and permanently disabled that I see no reason why we should go any further.

We have the greatest sympathy for the plaintiffs who are asking money from the Government. I think it behooves us to seriously consider the possibility that in the face of these circumstances, not because of the testimony, but because of sympathy, which they might feel for this elderly lady, gives them a verdict which would not be warranted by the testimony in the case.

If your Honor will read the testimony of this judge in Shreveport you will see that he disclosed a hot temper, excitability, and a lack of patience in dealing with circumstances
203 around him, and which he, in turn, interprets as insanity on the part of the insured. I say that the testimony is not sufficient to require the case to go to the jury. I renew my motion for a directed verdict.

The COURT. I think the case should go to the jury. The motion will be overruled.

213 (Mr. Miller read the following prayers to the jury, as follows:)

"Plaintiff's Instruction No. 1

You are instructed that the definition of the term "total disability" as contemplated by law with respect to the contracts upon which this suit is instituted is "any impairment
214 of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation" and that such "total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."

"Plaintiff's Instruction No. 6

You are instructed that in contemplation of law the insured was totally disabled if he was suffering from any impairment of mind which continuously rendered it impossible for him to follow any substantially gainful occupation which was founded upon conditions which rendered it reasonably certain that this condition would continue throughout his life."

"Plaintiff's Instruction No. 2

You are instructed that the mere fact that plaintiff may have worked for periods during the time when he claims to have been permanently and totally disabled is not conclusive against him. The question is not whether he worked or did not work, but whether he was able to work, that is whether he was able to follow continuously some substantially gainful occupation without material injury to his health, or at the risk of seriously aggravating his condition.

“Plaintiff’s Instruction No. 3

The term “total disability” does not mean that there must be proof of absolute incapacity to do any work at all. It is enough if there is such impairment of capacity as to render it impossible for the disabled person to continuously follow
215 any substantially gainful occupation.”

“Plaintiff’s Instruction No. 4

You are further instructed that intermittent irregular employment by the plaintiff and the receipt of reasonable compensation therefor is not, in and of itself, conclusive evidence of a lack of total and permanent disability, entitling the plaintiff to recover, but is to be considered only in connection with the other testimony in the case in determining whether or not said total and permanent disability did exist prior to January 13, 1933.”

“Plaintiff’s Instruction No. 7

If you are satisfied from all the evidence that the plaintiff became totally and permanently disabled as claimed on or prior to January 13, 1933 as that term has been defined to you in these instructions it was not necessary for him to make any further payments of premiums after so becoming totally and permanently disabled.”

“Plaintiff’s Instruction No. 8

You are instructed that this case is to be decided as though it were a contract between two private individuals and the fact that the government is a party should have no bearing upon your consideration of the matter.”

(Mr. Miller made an opening argument to the jury on behalf of the plaintiffs.)

216 (Mr. Costello made an opening argument to the jury on behalf of the United States.)

(Colonel Crenshaw made a closing argument to the jury on behalf of the United States.)

The COURT. Were your prayers read?

Colonel CRENSHAW. No, sir; I thought they would be read after your Honor’s charge.

Mr. MILLER. I do not think I will take more than another ten minutes.

(Mr. Miller made a closing argument to the jury on behalf of the plaintiffs.)

Mr. COSTELLO. At this time, your Honor, shall I read these prayers?

The COURT. Yes.

Mr. COSTELLO. These are the prayers which your Honor has informed was the law of the case.

(Mr. Costello read the prayers to the jury as follows:)

“Defendant’s Prayer Number 1

All the evidence of this case clearly proves that the insured, Albert T. Witbeck, died December 1, 1933, following an operation just a few days before for ruptured appendix, whereas the insurance herein sued upon lapsed on the 20th day of February, 1933. Therefore, on basis solely of the appendix, the operation therefor, and the death caused thereby, the plaintiffs herein would not be entitled to a verdict or judgment.”

217

“Defendant’s Prayer Number 2

Under the evidence of this case, the only disease or disability which may be considered as a possible proof of permanent and total disability of insured while the insurance was in force, is the testimony with reference to the mental competency or incompetency of insured on or before the date of lapse of the insurance sued upon, to wit, the 20th day of February, 1933; therefore, if the jury believes from a preponderance of the testimony that on such dates the insured, Albert T. Witbeck, was sane and competent mentally, you must return a verdict for the defendant.”

“Defendant’s Prayer Number 14

The preponderance of the evidence does not mean the greater number of witnesses, but comprises the reasonableness and convincing character of the whole evidence in the case. In determining the proper weight to give to any testimony, the jury may take into consideration the interest or bias, if any, of the witnesses in the result of the action; the consistency of statements made from the witness stand with statements made by the witnesses upon previous occasions; the opportunity of the witnesses for acquiring knowledge concerning the facts to which they have testified; the reasonableness or unreasonableness of the witness’ testimony; and the probability or lack of probability of all the facts and circumstances in the case.”

218

"Defendant's Prayer Number 15

The burden is upon the plaintiff to prove by a preponderance of the evidence that he became totally and permanently disabled on or prior to January 13, 1933, as that term is otherwise defined to you by the Court."

The COURT. I determine not to send the jury out this evening but will continue the case until 10:00 o'clock tomorrow morning and the jury will be excused until that hour.

(Thereupon at 3:30 o'clock p. m. an adjournment was taken until tomorrow, Thursday, March 31, 1939, at 10:00 o'clock a. m.)

219

Transcript of proceedings—Volume 4

Filed November 1, 1939

THURSDAY, MARCH 31, 1939.

The trial of the above-entitled cause was resumed before Associate Justice F. Dickinson Letts and the jury heretofore impaneled therein, in Civil Court Number 1 at 10:00 o'clock a. m. pursuant to adjournment on yesterday.

PROCEEDINGS

220 (Counsel for both sides approached the bench and conferred with the Court in a low tone of voice, as follows:)

Mr. MILLER. I offer these written objections to the granting of those two prayers with reasons set forth therein and I would like that to be incorporated in the record, if your Honor please.

The COURT. Perhaps I better make the Court's position about the second prayer a little more clear.

Colonel CRENSHAW. In what respect, your Honor?

The COURT. Well, you use the words, "sane and competent," and I think the real test is impairment of mind which continuously rendered it impossible for him to follow any substantial gainful occupation.

Colonel CRENSHAW. A serious impairment of mind, your Honor?

The COURT. At any rate, it has to be an impairment of mind that rendered it impossible for him to follow any substantial gainful occupation.

Colonel CRENSHAW. I think that will be all right, your Honor.

The COURT. I think, perhaps, I better clarify that a little.

"Plaintiff's Objections to Defendant's Prayers Numbered 1 and 2

"Plaintiffs, before the Court charges the jury in this case, objects and excepts to the granting by the Court of defendant's Prayer No. 1 for the reason that the second sentence thereof amounts in effect to a directed verdict against the plaintiffs by virtue
221 of the last sentence contained in said Prayer reading as follows:

'Therefore, on basis solely of the appendix, the operation therefor, and the death caused thereby, the plaintiffs herein would not be entitled to a verdict or judgment.'

"Reading this Prayer literally, particularly the last sentence thereof the Jury is instructed thereby that because the insured died following an operation for a ruptured appendix the plaintiffs are not entitled to a verdict or judgment.

"Plaintiffs do not take the position that they are entitled to a verdict because of the insured's ruptured appendix and death following the operation but are basing their claim upon other conditions of the insured as shown by the testimony.

"Plaintiffs also object to defendant's Prayer No. 2 particularly the last four lines thereof reading as follows:

'therefore, if the jury believes from a preponderance of the testimony that on such date the insured, Albert T. Witbeck, was sane and competent mentally, you must return a verdict for the defendant.'

for the reason that under the insured's contracts herein sued upon it is not necessary in order to recover for plaintiffs to show that the insured was insane and incompetent mentally, it only being necessary to show that the insured suffered any impairment of mind which continuously rendered it impossible for him to follow
222 any substantially gainful occupation, and which condition of mind was founded upon conditions which rendered it reasonably certain that such total disability would continue throughout the insured's life.

"Under the defendant's Prayer No. 2 the burden is placed upon plaintiffs to show that the insured was outright insane and incompetent mentally. That is more than the insurance contract requires and it is respectfully submitted is erroneous and without authority of and contrary to the law applicable to this case."

CHARGE TO THE JURY

The COURT (LETTS, J.): Members of the jury, there are a few facts which are either admitted in the pleadings or stand out in

dispute of the evidence. They are these; that two contracts of insurance which are now sued on were granted and issued to Albert Tyler Witbeck, the deceased, by the Government, who is the defendant here; these contracts of insurance being so granted and issued in 1924 and 1925. Secondly, that each of these contracts of insurance were \$5,000, and each was in force and full effect with the premiums paid up to and including January 13, 1933. Third, that the insured, Albert Tyler Witbeck, died on December 1, 1933. Fourth, that neither of these policies sued upon was in force on the date of the insured's death, because each had lapsed on January 13, 1933, by reason of non-payment of premiums. Fifth, that the plaintiff, Mr. Vas Os, is the duly appointed and qualified administrator of the estate of the insured. Sixth, that the plaintiff, Ella Tyler Witbeck, was the mother of the insured and is the beneficiary named in each of these contracts of insurance.

223 With respect to these contracts of insurance, you are told that they were issued by the Government to the insured and are what we know as contracts of war risk insurance. These policies, by their terms, are made payable to the insured if at any time during his lifetime, and a time when the policy was in force and effect, by reason of the payments of premiums required, should become permanently and totally disabled, within the meaning of that term as used in the policies and as understood in the law.

The policy became payable also to the beneficiary upon the death of the insured at a time when the policy was in full force and effect, by reason of the payments of premiums as required by the terms of the policy.

You are told in this case the insured died on December 1st, 1933. At that time neither of these policies were in force, because each had lapsed by reason of nonpayment of the premiums required on January 13, 1933. So, no claim is made here upon these policies, by these plaintiffs, for the benefits of these policies because of the death of the insured. But, as I have indicated, the policies also provided for payment of the benefits of the contracts if at any time, when the policy was in full force and effect, the insured became permanently and totally disabled. So, it is the contention here, as shown by the declaration of these plaintiffs, that Albert Tyler Witbeck, the insured, became permanently and totally disabled within the meaning of the policy, and within the purview of the law on January 13, 1933, or prior thereto.

224 It is claimed by these plaintiffs that by reason of such permanent and total disability as of that date, and the policy was in force, that they should be permitted to re-

cover and have the benefits of the policy. The Government answers by saying that the insured was not so permanently and totally disabled on January 13, 1933, or at any prior date, and therefore, there should be no recovery on the part of these plaintiffs, and that the verdict of this jury should be for the defendant.

Now, such is the sole issue in this case for the determination of this jury. Did he become permanently and totally disabled within the meaning of the law and within the meaning of the contracts of insurance on or before January 13, 1933?

You are told that, in the judgment of the Court, the evidence is such that the only hypothesis upon which these plaintiffs may be entitled to recover is that the insured became permanently and totally disabled by reason of impairment of mind to the extent and degree that by reason thereof he was unable to follow continuously some substantial, gainful occupation. That being the issue presented to this jury, you are told that the burden of proof is upon the plaintiffs. By this, I mean to say, that before these plaintiffs will be entitled to a verdict at your hands, they must establish a truth, that proposition of fact, and they must show and establish and prove it by the preponderance of evidence. The preponderance of evidence is the greater weight of the evidence as determined by this jury. If the plaintiffs have established that proposition of fact by a preponderance of the evidence, then your verdict should be for the plaintiffs. If the plaintiffs have failed to establish that proposition of fact then
225 they may not recover and your verdict must be for the defendant.

The definition of permanent and total disability has been given to you in the prayers which were allowed by the Court and read to you by counsel. In determining whether or not the insured was permanently and totally disabled by reason of mental impairment which rendered him unable to follow continuously such substantial, gainful occupation, you are to look to all of the facts and circumstances which have been shown in the evidence. The law makes this jury the sole judge of all questions of fact arising in the case. In determining these issues of fact it will be necessary for the jury to pass upon the credibility of the various witnesses who have testified either in person from the witness stand or through the medium of depositions which have been presented and read to this jury. In determining how much weight you will give to the testimony of any particular witness you may, and properly should, if present in Court, take into account the demeanor of that witness on the stand, and as to those witnesses who have testified by deposition, you should

take into account the means of knowledge, the capability of the witness, and the opportunity of the witness to know and understand the things to which they testified. If any witness has evidenced any bias or prejudice or favoritism one way or the other and you think by reason of that this witness has colored his or her testimony one way or the other, you may take all that into account. The weight of the evidence should not be determined by counting the witnesses. The number of witnesses makes no difference in itself. The test is, What witnesses are most
226 worthy of belief? In coming to your conclusions about such matters you may, and very properly should, take into consideration, and bring to your aid and general knowledge your experiences in life, your understanding of men in general, all to the end that you will determine correctly these matters of credibility and these matters of the weight of the evidence.

Perhaps, in what I have said, I have separated in your minds the manner in which you may hear the testimony of the witnesses who were present before you and those who testified by way of depositions. If so, you are advised that there is no distinction because of that manner of testifying, except that you have had the opportunity of seeing certain of the witnesses who did appear. Certain others who were not present were not observed by you. That goes to your estimate of the worthiness of witnesses that you have seen. But, in other respects, and as far as you may do so, you are asked to weigh each piece of evidence, as every other piece, comparing one part with every other part of the testimony given to the end that you will come to a common understanding of the case and that your verdict will be a true verdict and a just one, doing full justice between the plaintiffs on the one hand and the Government, which is the defendant, on the other hand.

As to the form of your verdict, you are told that if your verdict is for the plaintiffs it will be sufficient for you to so indicate to the Court. You may perceive that there may be rights under such circumstances for the administrator of the estate of the
227 deceased and certain other rights which will inure if the verdict is for the plaintiffs, to the mother of the insured, who is the beneficiary named in these policies. It is not necessary for the Court to refer those matters to the jury, because those rights will be understood and the rights of each will be protected in making up any judgment which may follow the verdict of this jury.

On the other hand, if you find that the plaintiffs have failed to establish their case by a preponderance of the evidence required, it will be sufficient for you simply to find for the defendant.

There is one question which I shall pursue, perhaps a little further in view of defendant's prayer number 2. As a part of that prayer you are advised that, "If the jury believes from a preponderance of the testimony that on such date," that is, January 13, 1933, "the insured, Albert T. Witbeck, was sane and competent mentally, you must return a verdict for the defendant." As you gather, the question is not the fact of whether the insured was insane or mentally incompetent in the sense in which those terms are sometimes used in law. All the Court intends to say in that prayer was that if you believe from a preponderance of evidence that on January 13, 1933, Albert T. Witbeck, the insured, had not suffered mental incompetence to the extent and degree that by reason of such mental impairment he was unable to follow continuously some substantial, gainful occupation and that your verdict should be for the defendant.

You understood from the testimony that has been placed before you and documentary evidence as well, that the insured, Albert T. Witbeck, died on December 1st, 1933, following 228 an operation in which the appendix of the deceased was removed. I suppose it is admitted from the evidence on that subject that that was the immediate cause of his death. But I think that that should give you no trouble in determining this issue, because here the question is not how the insured died or what the cause of his death was. It is only one of the incidents that came into the evidence of the case. The question, as you understand it, you will know is whether on or before January 13, 1933, the insured was or had become permanently and totally disabled by reason of mental impairment, which mental impairment had reached the degree or extent that it rendered him incapable of following continuously some substantial, gainful occupation.

Are there any suggestions, gentlemen?

Mr. COSTELLO. The only suggestion I have, your Honor, is that I wonder whether or not the jury will be allowed to take the exhibits into the jury room.

The COURT. I think not, unless they request them.

Hearing that suggestion from counsel, the jury will take the case. I suggest when you go to your jury room, you will select a foreman; that your deliberations be in order; that each member of this jury permit himself to be fully open in any matter involved in the trial and that every other juror shall be attentive to such discussions that may ensue. When you have your verdict you may return and announce it in open Court.

A JUROR. May we have the data of the case?

The COURT. Do you mean the exhibits?

A JUROR. Yes.

229 The COURT. Yes; I see no objection. I will send the exhibits in to you, gentlemen.

(Thereupon at 10:40 o'clock a. m. the trial was concluded.)

243 *Order authorizing the forwarding of depositions on file in the office of the clerk as a part of the transcript and record on appeal to the Clerk of the United States Court of Appeals for the District of Columbia*

Filed October 26, 1939

* * * * *

Under the petition of the United States Attorney, attorney for the defendant, United States of America, and for good cause shown, it is hereby Ordered that the original depositions on file in the Clerk's Office, of which there are no available copies, be transmitted as a part of the transcript and as a part of the record on appeal to the Clerk of the United States Court of Appeals for the District of Columbia.

This the 26 day of October, 1939.

F. DICKINSON LETTS,

Justice.

244 *Statement of points*

Filed October 31, 1939

* * * * *

In view of the fact that the stipulation as to record on appeal includes less than the entire record of proceedings and evidence, the defendant-appellant submits the following as points relied upon under this appeal.

I

Whether or not the District Court erred in refusing to grant defendant's motion to grant a directed verdict at the close of plaintiff's evidence.

II

Whether or not the District Court erred in refusing to grant defendant's motion for directed verdict at the close of all the evidence.

III

Whether or not there is substantial evidence to support or warrant a judgment for plaintiffs.

IV

Whether or not the District Court was in error in admitting in evidence, over objection by the defendant, the Coroner's report as an exhibit to the testimony of Dr. Willis P. Butler, a witness for the plaintiff, and the opinions of the witness based thereon, with reference to statements of third persons allegedly made to the witness in connection with an ex parte hearing of December 13, 1928, no opportunity being given to the defendant to cross-examine such third persons as to statements made, and whether or not such reports and opinions were materially prejudicial to the defendant.

V

Whether or not the District Court was in error in refusing to admit in evidence, as offered by defendant, the admittedly authentic and official decisions of the Supreme Court of Louisiana in the cases of *Witbeck v. Hughes et al.*, 134 Southern Reporter, P. 255 et seq.; *Witbeck v. Witbeck*, 128 Southern Reporter, decided June 2, 1930; *Witbeck v. Witbeck*, 141 Southern Reporter, P. 981 et seq., and *Witbeck v. Witbeck*, 127 Southern Reporter, P. 888 et seq., such decisions in effect refuting and overruling the opinion and finding of the Coroner which was admitted in evidence as an exhibit to the testimony of Dr. Willis P. Butler as the Coroner's report, such decisions of the Court of last resort determining the legal rights and status of the insured and his wife over their marital difficulties concerning which other evidence in the case from lay witnesses being obviously used for the chief support of the mental condition relied upon by plaintiff.

VI

Whether the District Court was in error in refusing to admit the testimony of Dr. W. S. Kerlin to the effect that the insured was sane and competent at a time material to the issue involved, the ruling of the Court being based upon the ground that the opinion and statements of the doctor were confidential and privileged, although the doctor claimed no such privi-

lege, and his patient, insured herein, now dead, procuring a single medical examination for the purpose of supporting a compensation claim, waived any privileged character thereof by filing the report of the examination with the Veterans' Administration, and in the fact that the doctor in his own testimony disclosed, aside from professional examination, ample opportunity to justify his opinions on the mental condition of the insured.

Respectfully submitted.

DAVID A. PINE,
*United States Attorney,
Attorney for defendant-appellant.*

247

Order

Filed August 22, 1939

* * * * *

It is respectfully requested that an extension of time be granted to prepare the record on appeal in the above entitled case to October 14, 1939. The notice of appeal was originally noted on the 19th of July 1939. The reason why this time is necessary is due to the size of the transcript of record which has just been obtained from the Court Reporters, together with the various exhibits that have to be incorporated therein.

F. DICKINSON LETTS,
Justice.

DAVID A. PINE,
United States Attorney.

248 *Order extending time for the filing of the record and
docketing of the cause on appeal*

Filed October 31, 1939

* * * * *

The attention of the Court having been called to the copy of the Order signed by this Court and filed on August 22, 1939, in the Clerk's Office, and to the effect that such purported Order appears to be a request for an extension of time rather than the granting of such an order, and it being made known to the Court that the Clerk's docket includes an entry on August 22, 1939, as follows: "8/22/39 Order extending time to 10/14/39 to prepare record on appeal (Notified 2) Letts, J.", and it appearing that no other formal Order granting such an extension is now contained in the Clerk's file, and it appearing to the Court that either

a clerical error was made in the preparation and filing of the purported Order or that a formal Order was granted extending the time for filing appeal and docketing the cause to and including October 14, 1939, now in order to correct the possible errors involved, and to correctly express the purpose and intention of this Court in granting an extension of time for the filing of record on appeal and docketing the cause to and including August 14, 1939,

It is ordered and adjudged, effective as of August 22, 1939, that the defendant in the above entitled cause be and is
249 granted an extension of time to and including October 14, 1939, within which to file the record on appeal and to docket the cause herein in the Court of Appeals.

It is further ordered that this Order be substituted for the purported Order which was filed August 22, 1939, and that this Order be deemed to have been filed as of that date.

This the 30 day of Oct., 1939.

F. DICKINSON LETTS,

Justice.

250 *Stipulation as to record*

(Filed November 1, 1939)

* * * * * *

It is hereby stipulated by and between attorneys for the defendant-appellant and plaintiff-appellee that the record on appeal in the above-entitled cause shall consist of the following designated parts of the record, proceedings and evidence:

1. Plaintiff's declaration.
2. Defendant's plea to the declaration.
3. Motion to set aside verdict and judgment, or, in the alternative, grant a new trial.
4. Final judgment in favor of plaintiff.
5. Notice of appeal.
6. Transcript of evidence and proceedings at the trial in the District Court, including original depositions and exhibits. (Explanation—In an effort to reduce the volume of the record and to exclude parts deemed unnecessary or immaterial on this appeal, the transcript of the Court Reporter has been marked with red pencil to indicate the portions to be excluded from the printed record. These parts so marked and to be excluded, appear on the following pages of the transcript: Vol. 1, Cover Page, Pages 2, 3, 4, 5, 6, 7, 8, and part of 9; part of P. 14, part of P. 56; Vol. 2, Cover Page, part of P. 106, part of P. 136, part of P. 148, part of P. 154;

Vol. 3, Cover Page, part of P. 156, part of P. 185. Beginning on Page 195 to and including part of Page 205; Vol. 4, Cover Page, part of P. 212, Pages 223 to and including 235.)

It is agreed that the only exhibits necessary or material to the issue on this appeal are those quoted in whole or in part in the transcript of record, and where not so quoted there has been prepared by this agreement copies in whole or in part, or such descriptions as are deemed sufficient, and which such copies as have been agreed upon are attached to the proper page of the transcript, as follows:

251 Defendant's Exhibits Numbers 7 to 23, inclusive, an agreed summary of the material parts of these exhibits has been prepared and is attached to P. 183 of the transcript; Defendant's Exhibit No. 5, the agreed material part has been copied and is attached to P. 185 of the transcript; Defendant's Exhibit No. 32, copy of letter of A. T. Witbeck, addressed to Professor Allen Johnson, and copy of the reply of Professor Johnson, together with an agreed description of two other papers attached to P. 185 of the transcript; Defendant's Exhibit No. 33, an agreed description is attached to P. 185; Defendant's Exhibit No. 34, copy of letter from A. T. Witbeck to Dr. Allen Johnson and copy of his reply is attached to transcript, P. 185; Defendant's Exhibit No. 35, copy of letter from Albert Tyler Witbeck to Dr. Dumas Malone is attached to P. 185 of the transcript; Defendant's Exhibit No. 24, part of letter from Albert T. Witbeck to General Frank T. Hines, dated May 27, 1933, attached to P. 185 of the transcript.

7. Order authorizing forwarding of original depositions on file in Clerk's Office as part of the transcript of record on appeal, together with the original depositions contained in the following volumes: Volume 1, so marked, Judge W. C. Barnette, Dr. Willis P. Butler, Mrs. Lucy C. Mathews, Mrs. Marguerite Carlton Blane, Mrs. Ella C. Levy, and Mrs. Carrie N. Henry; Volume 2, so marked, Dr. J. M. Gorton, Mr. E. Wayles Browne, Mr. F. E. Lacaze, Mr. R. O. Roy, and Mr. John E. Heard; Volume 3, so marked, transcript of testimony of Albert Tyler Witbeck in the trial of the case of A. J. Broderick and George Calvert v. Sabine Lumber Company, in the United States District Court for the Western District of Louisiana; and Volume 4, so marked, Mrs. John Marshall and Dr. W. S. Kerlin. The deposition of Judge W. C. Barnette was offered in evidence, as shown on P. 97 of Vol. 1 of the transcript of testimony and should appear in the printed record at that point; the deposition of Dr. Willis P. Butler was offered in evidence, as shown on P. 98, Vol. 1, of the transcript

and should appear in the printed record at that point; the deposition of Mrs. Lucy C. Mathews was offered in evidence as shown in Vol. 2, P. 111, of the transcript and should appear in the printed record at that point; deposition of Mrs. Marguerite Carlton Blane was offered in evidence, as shown in Vol. 2, P. 112, of the transcript, and should appear in the printed record at that point; the deposition of Mrs. Ella C. Levy was offered in evidence, as shown in Vol. 2, P. 132, of the transcript, and should appear in the printed record at that point; the deposition of Mrs. Carrie M. Henry was offered in evidence, as shown in Vol. 2, P. 132 of the transcript, and should appear at that point; the deposition of Dr. J. M. Gorton was offered in evidence, as shown by Vol. 2, P. 145, and should appear in the printed record at that point; the deposition of E. Wayles Brown was offered in evidence, as shown by Vol. 2, P. 147, of the transcript, and should appear in the printed record at that point; the deposition of F. E. Lacaze was offered in evidence, as shown by Vol. 2, P. 153, and should appear in the printed record at that point; the deposition of R. O. Roy was offered in evidence, as shown by Vol. 2, P. 153, of the transcript, and should appear in the printed record at that point; the deposition of John E. Heard was offered in evidence, as shown by Vol. 3, P. 157 of the transcript, and should appear in the printed record at that point; the deposition of Mrs. John Marshall was offered in evidence, as shown by Vol. 3, P. 158 of the transcript, and should appear at that point; the transcript of record and testimony of Albert Tyler Witbeck, above referred to, was offered as an exhibit to the testimony of Mrs. John Marshall and offered in evidence, as shown by Vol. 3, P. 159 of the transcript, and should appear in the printed record at that point; the deposition of Dr. W. S. Kerlin was offered in evidence, as shown by Vol. 3, P. 167 of the transcript, and should appear in the printed record at that point. (The original depositions forwarded with this record have been marked by agreement of counsel in an effort to eliminate immaterial portions thereof and to indicate the rulings of the Court in admission or exclusion of parts thereof by the trial Judge.)

8. Statement of points by the defendant-appellant.

9. Purported order of the District Court, marked filed August 22, 1939, with reference to extending time for appeal to October 14, 1939.

10. Order of the District Court extending time for the filing of record and docketing of cause on appeal, dated October 30, 1939, as a substitute for the order marked filed August 22, 1939.

11. This stipulation of record.

Dated this 1st day of November, 1939.

WARREN E. MILLER,
Attorney for Plaintiff-Appellee.

DAVID A. PINE,
U. S. Attorney.

By ALLEN CRENSHAW,
Attorney for Defendant-Appellant.

MEMORANDUM

October 19, 1939

Time to file transcript of record extended to and including November 1, 1939.

253 District Court of the United States
for the District of Columbia

UNITED STATES OF AMERICA.

District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 252, both inclusive, to be a true and correct transcript of the record, according to stipulation of counsel herein filed, copy of which is made part of this transcript, in cause No. 88796 at Law, wherein Seymour Van Os, Administrator of the Estate of Albert Tyler Witbeck, deceased, and Ella Tyler Witbeck, Beneficiary of Albert Tyler Witbeck, deceased, are Plaintiffs and United States of America, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 1st day of November, 1939.

[SEAL]

C. E. STEWART, *Clerk.*

257 Judge W. C. BARNETTE, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. MILLER:

Q. Will you state your name, residence, and occupation?

A. My name is William C. Barnette. I am sixty-three years old. I am Judge of the Juvenile Court for Shreveport, Caddo Parish, Louisiana, and have been for over five years; I believe from about August 17th or 18th, 1933.

Q. Did you know Albert Tyler Witbeck who lived here?

A. Yes, sir; I knew him.

Q. About when did you first know him?

A. My first knowledge of Mr. Witbeck must date back probably to as early as 1920. I have no data in my mind by which I could fix the exact date. Possibly longer.

Q. Did you have occasion to observe him at intervals from then until he died in 1933?

258 A. Yes; I had opportunities of observing him.

Q. And did you observe him?

A. No; I paid no attention to Mr. Witbeck until he began his litigation with his wife in the district court, which was back about—may I make reference to my record, we may save time. I do not see any definite date but I would say around 1930 or 1931, as near as I can remember about the litigation.

Q. From the time that this litigation in the district court began you had opportunity or occasion from time to time to observe him?

A. Yes, sir.

Q. Just state in your own words what you now recall with reference to his condition, as you observed it, stating the approximate time as best you can fix it.

A. As I remember, I first began to observe Mr. Witbeck in connection with his litigation. I had no connection whatever with it. My office at the time was in the Commercial National Bank Building and Mrs. Witbeck was employed in an office just a door or two from my office. I was well acquainted with her and I was also well acquainted with Mr. S. O. Williams, who seemed to occupy some official position in the management of the office. For short intervals, probably over a period of several months, I visited there, and had it not been for the personal acquaintance with the wife of Mr. Witbeck I am sure that

259 I would not have taken any notice at all. I knew him to come there at intervals, and finally there was some kind of proceeding in the district court. He did not return after that time, insofar as I know. However, William Witbeck, the boy, would come up rather frequently. I saw nothing about that to attract my attention except to know that it was the Witbeck boy. That was over some considerable period of time but I would not undertake to be certain as to the time that it was going on.

During August of 1933 the governor called me over the phone and asked me to accept the appointment of Judge of the Juvenile Court. I accepted the appointment, although I had not made application for it.

I do not know just how long, but within a few months, at least—if I may refer to a memorandum, I see an affidavit signed by me, I will give you the exact time, as near as I can [examining record]. Well it was very shortly—it was within days, not months—about the 25th of August 1933, as I see an affidavit signed by me as judge charging Mr. Witbeck with an offense before this court. That grew out of the relationship between him and his wife as it involved the divorce proceedings. There was a great deal of talk about it. I mean I heard more than
260 most people because I was so closely associated with the wife, being so very near her office.

Mr. MILLER:

Q. Judge, just tell us in your own words what you personally observed about Mr. Witbeck's condition, giving the dates the best you can.

A. That is exactly what I was leading up to. After Mr. Witbeck was arrested in this court in connection with this matter he was released some days afterward on bond of One Hundred (\$100.00) Dollars. I think that was the amount; I notice in the record there. He came from the office of the clerk one day and just pulled the door open without any warning and came in in a kind of bolting manner, as though he was a mad man. He spoke to the judge and wanted to know, "What is the reason I cannot get a trial in this court?" That was a very unusual thing, very much out of order, and contrary to the decorum of this court. The judge told him he could get trial, if he wanted it, the next month and, inasmuch as the Court knew all of the facts about it, I could tell him what his punishment was going to be.

Q. You were that judge?

A. I was that judge. In fact I had been trying to get some reason into the situation and to help him. I will refrain
261 from giving the exact language that I used to him, but it wasn't very nice. The situation was just a very unusual one for this judge and the irritation of the judge went beyond what you would ordinarily expect because it was an extraordinary incident. I had hoped that there would be some solution by which the thing would get out of the court because the agitation given to the matter on account of his talking about it and moving from place to place around over the streets, talking to anybody who would talk to him, had become somewhat disgusting, it seemed to me. That is about the substance of it.

Q. Did he seem to be rational or irrational when he came in to see you?

A. I am not an expert, of course, on insanity or anything of that sort, and I do not wish to go on record as expressing an opinion, but he acted like a crazy man to me.

Q. Approximately when did this occurrence happen, Judge when he came into your office, as you have stated—having refreshed your recollection from your record?

A. After refreshing my memory from the record, it was some time subsequent to August 25th, 1933, and I would say within probably two or three weeks. I had been trying to let the thing die without doing anything about it because I regarded the man as much irresponsible as I did vicious, and it being just one
262 family involved I was trying to seek some way to just let the thing die. We get a matter of that sort sometimes and the Judge of the Juvenile Court uses his own discretion in those matters where greater justice can be served by getting the thing adjusted and the family taken care of in connection with it. I was endeavoring to treat the Witbeck matter in the same way.

Q. Then you permitted this matter to die without further action?

A. Yes; I permitted it to die without making any orders in the case at all.

Q. And why was that?

A. For the reason I have just given you. Also I learned in the meantime from confidential sources, this would be hearsay, that Mrs. Witbeck was contemplating a second marriage. I thought that the marriage contemplated would take her away from here and when that would be accomplished I felt that the motive for all of this or most of this harangue and hurrah would have been removed. That is the reason I so acted, and that was finally done and that was the way it ended.

Mr. MILLER:

Q. What was your information, if you had any, Judge, as to whether or not Mr. Witbeck was mentally unbalanced at that time?

A. I do not think there was any doubt as to some degree
263 of unbalance as to Witbeck's mind over a rather substantial period. Just to what extent the unbalanced mind was I would not venture to give an opinion but I do not think he was a balanced man.

Q. Did you have occasion, Judge, back around 1925 to observe Mr. Witbeck's work and, if so, just tell in your own words what that was?

A. Well, yes, sir; I did. I bought some property out in the country during 1925, about two hundred acres of rather high price land for this country, and I put on it a great many improvements and I moved out there. I moved there about January, 1926, I believe it was, and I wanted to buy some land adjoining containing approximately forty or fifty acres. Part of that forty or fifty acres, maybe thirty acres of it, had been subdivided into homesteads, small homesteads. In fact it had been surveyed for small homesteads, I do not know just how many lots, but they were not uniform in size. An old man by the name of Leopard had owned the property.

It was only hearsay to me as to who had Witbeck to do it and I do not want to violate the rules, but at any rate I found all this surveyed and the space marked off, and when I got ready to really do something in connection with my own property I found it was almost impossible for me to find the exact location of the lines.

264 The description of proces verbal of his survey was only a memorandum that I had. I do not know whether anything official was ever made of it or not. I could not do anything at all with it. I began to make inquiry as to who made the survey and after getting information I contacted Mr. Witbeck to get him to assist in making such description as I could definitely locate the property by. I have had a good deal of experience in handling land matters but I could not understand this situation, although it may have been somewhat simple enough to have understood.

There was a railroad track running diagonally across the piece of land and the lots were surveyed with reference to the railroad on one side of it and with reference to Highway #80 on the other side. Highway #80 was a paved highway and the property to the west was not defined in such manner as you could find definitely, according to my opinion, where it started; and the difference it made with me was that if you slid it toward the east it made the lots longer and if you slid it towards the west it made them shorter; and it did make a difference in the property that I had to the south of the railroad, there being difficulty in finding the lines. It became a very difficult situation, according to my idea and the ideas of those who were trying to assist me in doing anything with it.

I had Mr. Witbeck to come to the office and to re-write a memorandum of the description. After I went over that
265 I found that it was not any better than the other one, according to my view, and in a few days, when I could get

time to do it, I asked him to come back again and I talked to him for a considerable length of time. I undertook to assist him in fixing in a memorandum, that I was to use, the starting places of the property, and finally worked out something that I felt was sufficient. I abandoned then all of the survey that he had and asked the police jury to recall the streets that had been dedicated. That was done largely because of the fact, whether I was right about it or whether I was wrong about it I am not saying, that I did not feel I would ever be able to get the straight of it.

Q. On those occasions did he seem to have sense enough to perform work the way an average person in that profession, a surveyor, would perform work?

A. I hardly feel capable of saying that. I thought he was or I would not have had him, but in the conversations I had with him I felt entirely uncertain about him when I got through. I have had no experience in surveying, that is, of any consequence. I have had quite a bit of land and, of course, I have had surveys made and it did not seem to me as though he ever was able to get it as an expert surveyor should have done it.

Q. Was there an occasion, Judge, after you were appointed in 1933, when Mr. Witbeck again came before you on a charge of contributing to the delinquency of the minor child or
266 or something in connection with that? If you recall what it is you may state.

A. Yes. In the record there the specific complaint as to his contributing just states contributing to the general delinquency of the child. It does not state specifically.

Q. Was that what Mr. Witbeck was called before you for, contributing to the delinquency of his minor son?

A. Yes, sir.

Q. Do you have any knowledge with reference to Mr. Witbeck's attitude towards the judges of the courts? If so, what?

A. Only by hearsay. In my conversations with him I told him if I ever heard of his making derogatory statements about the judges of the district court, especially Judge Mills, as I had heard he had made, I was going to put him in jail. Of course, I had heard a part of that or I would not have said that to him.

Q. Do you recall saying that to him personally?

267 A. Yes, sir. I said that to him following the storm that he created when he came into the judge's private office with the kind of outburst that I have detailed. I also told him

that the abuse he had been heaping on other officials had to cease because I wasn't going to have it.

Q. Judge, do you recall now any other incident or occurrence which indicated to you a mental condition out of the ordinary?

A. I only know by hearsay some matters. I had occasion to talk to the sheriff of this parish with regard to Witbeck because I considered him an abnormal person some way. I don't know why, and the sheriff told me about certain complaints, etc.; but that would be hearsay.

Q. Let me ask you this. Based on your observation of Mr. Witbeck, as you have related here today, that is, personal observation, not hearsay testimony, did you feel he was an abnormal person mentally?

Mr. FAY. Defendant objects to the question.

The WITNESS. I think he was abnormal.

Mr. MILLER:

Q. Judge., based on your personal observation of Mr. Witbeck, concerning which you are testifying here today, not considering any hearsay matters, in 1933 after you were appointed judge of this court, which position you still hold, in your opinion was his conduct rational or irrational?

268 Mr. FAY. Defendant objects to the question.

The WITNESS. Well, I did not regard him as a balanced man at any time after I first began to contact him.

Q. That is, balance insofar as his mind was concerned?

A. Yes, insofar as his mind was concerned. He seemed to be smart in some respects, that is, he had book knowledge, but I did not feel that he was a normal person mentally. I do not know that I could define it any more than just in general terms.

Q. Thank you, Judge. Mr. Fay may want to ask you some questions.

Cross-examination by Mr. FAY.

Q. In your first meeting with Mr. Witbeck what was your idea as to his personality?

A. I do not have any distinct recollection of the time of the first meeting with Mr. Witbeck but I do know that I had met him on some occasions prior to the times I have detailed.

Q. Then, Judge, take 1925, when you did have direct contact with Mr. Witbeck.

A. It was later than 1925 that I had contact with him.

Q. 1925 or 1926 I believe you stated on direct examination.

A. Yes, I think it was about 1926. I am not positive about the exact time. It could have been as late as 1927 before
269 I had it.

Q. Well, that is all right. We are just trying to place it as close as we can and I will make my question read around about the time that you did have direct contact with him, whether it was 1925, 1926 or 1927.

A. Yes.

Q. What was your idea or what opinion did you have as to his personality at that time?

A. Well, up until then I had no opinion one way or the other. I just had not noticed him. At the time that I began to discuss with him the matters detailed by me heretofore I had no thought of any mental condition one way or the other. However, I felt that the interviews had with him were unsatisfactory. That was the biggest impression. Without undertaking to fix any particular reason for it that is the feeling I had about it.

Q. Thinking back at that time, Judge, did you consider him an overbearing individual?

A. What do you mean by overbearing?

Q. In the sense that it is usually used in a dominating type; one who forces himself upon you, one who thinks he is always right, never wrong.

A. I considered that one of his most extreme offenses as early as I first met him.

Q. You did?

270 Yes. He seemed to me to be a man who was dominating and unreasonable in his—well what I am trying to say is this. As early as that time Mr. Witbeck seemed to be so completely satisfied with his own knowledge and opinions until he appeared to have little tolerance for the viewpoint of another, even though it seemed to the other as disturbing. That was my state of mind about it. The last time he came in my office it looked as though he felt like he had fooled with me long enough. I had no connection with him other than that.

Q. Would you say, Judge, that he was a highly nervous individual at that time?

A. Yes, sir; I am rather inclined to the belief that Mr. Witbeck was highly nervous from the first time I ever met him. Whether that would affect his mind or not I am not prepared to say.

Q. No; I was not asking with reference to that. I am just trying to get the characteristics of the man so we will have a complete picture.

A. The first impression that I had after I was acquainted with him was that he was of an irascible nature but very friendly if there was nothing to precipitate a different field of thought.

Q. If you did not cross him he was all right, is that correct?

A. Well, I would not want to say it just quite that way.
271 I do not know just what it would take to make him that way. However, he was a man that I considered irascible and unreasonable, more so, quite, than the average ordinary person. Now that is my thought on the subject. I have no interest in this matter whatever and I am trying to help the government and the plaintiff just as much as I can to get a true picture.

Q. We appreciate that and that is the only reason we are bothering you at all, Judge, is to get a clear picture.

A. It doesn't bother me at all. I am glad to do it.

Q. Judge, do you know where Mr. Witbeck was living around about the time you first came in contact with him?

A. No, sir; I don't. I don't know that I have ever known where he lived.

Q. Judge, how many times did you actually come in direct contact with Mr. Whitlock during his lifetime, to your knowledge?

A. I would not want to undertake to fix a definite number or anything like that but I knew him. Since you have asked me that question, I have a thought that has just occurred to my mind and suggests something. I was attorney for the Noel Estate and prior to that time Mr. Noel had engaged Mr. Witbeck to do some kind of surveying work. I do not know what it was, I cannot
remember that, but I remember him being in my office on

272 some several occasions and of his talking to myself and Mr.

W. B. Noel, Mr. Noel being the son of the old deceased Noel, Mr. Jess Noel. At that time I had to depend on Mr. Noel to do all the negotiating. I had nothing to do with that but I had to pass on the legal side of anything that was under consideration, and I did not form any impression concerning Mr. Witbeck one way or the other on those occasions.

Q. Could you state an approximate date on that, Judge? I mean the year. Did that particular incident occur in a year that you can think of? Do you remember in what year it did happen? I am asking for the best of your remembrance.

A. Well, that must have been probably 1922 or 1923; somewhere along there.

Q. I see.

A. Possibly 1921.

Q. Judge, do you recall whether or not you considered Mr. Witbeck capable of writing a book, we will say around 1930, 1931, 1932, or 1933?

A. Oh, I don't know about book writing. I have known lots of writers I thought were crazy. It is just frequently the case that writers are freakish; probably would be terribly unbalanced in some respects.

Q. Would you consider Mr. Witbeck capable of testifying as an expert witness as a civil engineer in 1930, 1931, 1932, or 1933?

273 A. Well, probably so, where it involved the theory of his profession, the technology of it. Insofar as I know, he did that, but I would very much doubt that he would be accurate in case he undertook to make a practical application.

Q. Do you know, Judge, if Mr. Witbeck drove a car?

A. No, sir, I do not.

Q. Towards the end of his life?

A. I do not.

Q. You do not know?

A. I think he did. I think I have seen him riding in cars. I would not say definitely but I believe he did.

Redirect examination by Mr. MILLER:

Q. Just one question for the record. Judge, will you state for the record just how long you have been practicing law here in the State of Louisiana?

A. Well, I was admitted to the Bar in 1903. I practiced general law as a young fledgling and just three years after I was admitted to the Bar I was nominated district attorney. I believe it was just a little past three years when I took the oath. I served two terms. The first term was part of a term. I just do not remember the length of it but I think it was something over two years. I was reelected and served that term and then I was elected district judge.

274 I served as district judge for not quite a full term and decided that I had moved out too fast in the judiciary at such an age and I resigned. The work was highly pleasing to me to start with but I became convinced that I ought to have had more maturity, and I retired from it voluntarily and engaged then in the practice of law generally for a number of years; I think about seventeen years.

I had no idea of ever seeking any other office and until I was appointed to this office by the governor such a thing was foreign to me. I had learned about thirty-six hours before I was actually appointed that I was being considered. Some friends of mine called me from Baton Rouge and I told them I had been thinking about it and I kind of thought that I would like it. The appointment was made the next day and I took this office and have been here ever since. That is about the history.

Dr. WILLIS P. BUTLER, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

275 Direct examination by Mr. MILLER:

Q. State your name, residence, and occupation.

A. Dr. Willis P. Butler, Physician, Shreveport, Louisiana. My office is Coroner and Parish Physician of Caddo Parish, Louisiana.

Q. You are a duly licensed and practicing physician in the State of Louisiana?

A. Yes.

Q. How long have you been so licensed to practice?

A. About twenty-seven years.

Q. Of what medical societies or associations, are you a member?

A. Most all of the state and local associations, American Medical, and several special societies.

Q. How long have you been Coroner of Caddo Parish?

A. About twenty-three years.

Q. Here?

A. Yes.

Q. What are your duties as coroner, just briefly?

A. The main thing is to take care of all the unusual deaths in the parish, have charge of the parish prisoners, from a medical standpoint, and the care of the nervous mentally and insane before they go to institutions other than the jail.

Q. Is it part of your duties to request sanity hearings
276 of individuals?

A. Well the requests are more made to the coroner than made by the coroner, who, after such a hearing, makes a report to the proper authorities.

Q. About, approximately, how many people comprise the parish and district?

A. I do not know but I would estimate it to be upward of One Hundred Fifty Thousand (150,000).

Q. In the course of your official duties as coroner did you have occasion to meet or to come in contact with Albert Tyler Witbeck, a resident of this parish?

A. Yes, sir.

Q. In connection with your official duties as coroner did you have occasion to make a request for a sanity hearing, through the district attorney, in this case?

A. Yes.

Q. State the circumstances.

A. Yes, I asked for a warrant for his confinement in jail for observation on December 3rd, 1928.

Q. State the circumstances under which that was done and, if necessary, refer to your records in order to refresh your recollection. Were the records which you have before you made by you at the time?

A. Yes, there are my official records.

Q. With reference to this, can you testify specifically as
277 to dates, with exactness, without referring to your records?

A. No, sir. Due to the length of time and number of cases I would not be able to do that.

Q. Refreshing your recollection from your records, Doctor, just testify in your own words as to what happened, of your own personal knowledge, with reference to Mr. Albert Tyler Witbeck, giving the dates, if possible.

A. On the 3rd of December, 1928, Mr. Witbeck's wife and a lady friend of hers by the name of Mrs. Bush came to me from the sheriff's office. They had reported Mr. Witbeck's condition to the sheriff and he sent them to see me. The sheriff then called me about five o'clock in the afternoon and talked to me about the case. I went into the history of the case with Mrs. Witbeck and was convinced from what she told me that there was something wrong in the family and there was potential danger if the situation was not remedied.

Mr. FAY. Just a minute, Doctor. For the purpose of the record, defendant objects to any of the testimony obtained by the Doctor from other persons, and moves that the same be stricken.

Mr. MILLER:

Q. Doctor, just tell us, in your own words, what occurred on or about the 3rd of December, 1928, according to your recollection as refreshed by your official records.

A. In conference with Mrs. Witbeck, Mr. J. Y. Snyder, a
278 friend of mine living in the same block, Sheriff T. R.

Hughes, the District Attorney, Mr. Sidney Herold, a local attorney, Mr. R. O. Roy, an oil man, Mr. W. H. Hodges, a plantation owner living near Shreveport, Dr. J. M. Gorton, a local physician, and Mrs. Mathews, a friend of Mrs. Witbeck, I learned that on several occasions, according to information given me by different ones of the above named parties, Mr. Witbeck had been acting in a manner that made them feel he was mentally unbalanced or in some manner a sick man and should be observed.

On that date I asked the district attorney for a warrant for his arrest as an insane person, that he might be placed in the Caddo Parish jail under observation. I found from the history of the case that there was family trouble. That he had been in trouble at one of the local hotels. That there had been trouble reported by the police officers. That he had gone to one of the local schools and warned one of the teachers concerning his little boy, whom he claimed had a violent and infectious disease. That he had made a number of threats against the lives of members of his family and his own life. That he had placed a pistol to his own head in a threat to commit suicide; having fired the gun in the house. That he had bored holes through the walls and ceilings of his house to peep on his neighbors, and in other different ways had conducted himself in a way that
279 made us suspect there was something wrong. Further examinations and tests were necessary.

Mr. FAY. Defendant objects to the above answer and moves that it be stricken as not within the direct knowledge of the witness.

Mr. MILLER:

Q. Doctor, when you used the expression "there was something wrong" just what did you mean?

A. Mentally; mentally wrong.

Q. Just proceed, Doctor, and tell us in your own words what you know.

A. After keeping Mr. Witbeck in jail about one or two days I began my examinations and observations and called upon Dr. Young, who at that time lived in Shreveport, a specialist in psychiatry, and obtained his help and assistance in examining Mr. Witbeck.

Q. Did you prepare a complete report of the findings made when you examined him?

A. Yes, sir.

Q. Do you have those reports in your files, Doctor?

A. Yes, sir. This is a report of the detail physical findings. It consists of laboratory examinations and summary as a report of those findings.

(Witness producing report.)

Q. In order to save time Doctor, I will ask the notary
280 to mark this report as Plaintiffs' Exhibit #1, consisting of four (4) typewritten pages.

(Notary marking exhibit P-1A, P-1B, P-1C, P-1D.)

Mr. MILLER. At this time plaintiffs offer the exhibits just marked P-1A, P-1B, P-1C, and P-D, with the understanding that copies may be made by the notary and the original records returned to Dr. Butler's office. This is by stipulation of counsel.

Mr. FAY. Defendant will object to the complaint as obtained from the wife, shown on page P-1B, and moves that it be stricken. There is no objection to the form of the report and it is agreed that the copy shall be prepared by the notary and attached and made part of the deposition, the original to be retained in the office of Dr. Butler. Any further objections as to the contents of the record shall be made by the defendant at the trial.

(Whereupon the notary received the report for identification and a certified copy of each page is herewith attached to this deposition, bearing identification marks P-1A, P-1B, P-1C, and P-1D, respectively.)

Mr. MILLER.

Q. Doctor just proceed with a detail of what you personally observed as to Albert Tyler Witbeck.

A. After having Mr. Witbeck in jail from the 3rd of December, 1928, until the 13th of December, 1928, and having completed observations and examinations and made a report
281 of same, I then had a conference in the district attorney's office with Judge Samuel of the City Court, Mr. Jim Casserly, and Mr. Seymour Van Os, both of the American Legion, and Mr. Percy Browne, local attorney and legionnaire, the object of this conference being to enlist the cooperation of these gentlemen and, with the district attorney's consent, to have Mr. Witbeck placed in a government institution for further observation and to carry out the ideas suggested by the doctors for his benefit, that he might, if possible, be adjusted.

Q. Doctor as time went on and looking now at the situation as to Mr. Witbeck's mental condition, as you have observed, what is your opinion with respect to whether or not this was a permanent mental condition?

A. Well I did not know at the time and that was the reason we wanted further assistance and desired more time to pass in order to see what would develop. As time did go on, on various occasions, I do not remember the dates, I saw Mr. Witbeck and I heard from him, one occasion being when he was in Washington, and I became definitely convinced that he was a mental case. Not really insane but incompetent and unreliable and, in my opinion, permanently so.

Q. What was the occasion of your hearing from him in Washington? What did he write you?

A. He made the claim to me that during the spinal
282 puncture, at which time the fluid was taken for laboratory test, the date being December 10th, 1928, the needle had broken off in his back and had remained in there for a considerable period of time; that the doctor had deceived him about it being there; that this needle had later been removed by a surgeon in Washington, and that he was holding it in his possession as legal evidence when he decided to go to court in the matter against the doctor.

Q. Was this spinal puncture taken at the time that you and Dr. Young examined him?

A. Yes.

Q. And then did Mr. Witbeck send you the needle or part of needle that he alleged was taken from his back?

A. He claimed to have it and would not turn it over to me. I might state, if it is permissible, that in order to be certain, not knowing and not being present when the puncture was actually made, I contacted the doctor and the nurse who were on duty in the sanitarium where the puncture was made, and got the record and found that insofar as the record went and insofar as statements went there was no foundation for the claim.

Mr. FAY. Defendant will object to the answer.

Mr. MILLER.

Q. What did you personally observe at that time as to the stability of Mr. Witbeck?

A. Very unstable.

283 Q. Just give us your own impression as a physician as to his ability to continue on any one task until it was completed.

A. I considered Mr. Witbeck a well educated man, a man of marked ability, but a man who could not pursue any one line of thought or activity on to a rational or reasonable conclusion. He would have ideas that I believe he thought were perfectly true

and correct. He would start out on this main idea but would be side tracked by something and in a short time that would then become the main issue with him. He was really unable to rationally follow out any definite or reasonable project. This condition existed to such extent that if I had had any work that I wanted carefully and accurately done I would not have given it to him. No matter what education and ability he might have he did not have the stability to do the work and was not dependable or reliable in carrying it out.

Q. Could you tell us about how frequently you observed Mr. Witbeck after 1928, the year he was in jail?

A. No, sir; I really don't remember. I have numerous small notes that were not put into the record, but it was infrequent. It might have been that many months would go by when I would not see Mr. Witbeck and then probably I would see him twice in a week. It was very irregular.

Q. When you did see him what did you observe as to the progress of his condition?

284 A. I considered his case to be progressively worse. On one occasion he came to see me——

Q. (Interrupting.) Let me interrupt you a moment. State any specific instance that you recall.

A. Well, I do not recall the months nor year but Mr. Witbeck came to me on more than one occasion concerning his family matters and with the thought that he was going to get things straightened out and leading me to at least hope that he was. However, it probably would not be more than two days before I would find the same condition was persisting.

Q. What was the condition?

A. The disturbance at the home and concerning his wife's position in the Christian Science Church and her responsibility for the records that she thought he had destroyed, but which he evidently had not.

Q. What do you know with reference to him destroying records of that character, insofar as your own knowledge is concerned?

A. Well, the actual facts were that his wife reported to me in considerable alarm that he had destroyed the letter files and her church records. When his wife advised me of this he came voluntarily to the office and admitted. He said that he had not done so, that those were just duplicates. He told us that he had retained the originals and told us where they were to be found. I do not remember where the place was but I think it was somewhere at his house.

285 Mr. FAY. Defendant objects to the answer and asks it be stricken as not within the personal knowledge of the witness.

Mr. MILLER:

Q. Was he not particularly suspicious when you examined him?

A. Markedly so.

Q. Just describe for the purpose of the record, in order that the jury back in Washington may get a word picture of his condition as you personally observed it, Doctor, what you now recall about him from personal observation. In other words, let us have as good a word picture of his condition as it is possible for you to give.

A. I might find it a little difficult to give in words a picture of Mr. Witbeck, of his type. In brief summary I will say he was a man of marked intellectual and educational attainments; a man who was rather ambitious and wished to go far in his profession; a man who was markedly suspicious of his business associates, professional associates, and of his family, also his neighbors. He would exhibit that by doing things that the normal man would not be expected to do, such as peeping over transoms, cutting holes and boring holes through walls and ceilings through which to peep, reading his friends' correspondence without their permission in order to see if he could find something interesting to himself. All of these things he admitted to me, personally, and talked to me about. He gave as his reason——

286 Q. (Interrupting.) That was while he was consulting you, when you had him in charge?

A. Yes; in jail. He gave as his reason, mainly, the fact that he did not think his wife should have the full custody in the rearing of the boy. At that time I think that the boy was about thirteen years old and he felt or claimed to feel that the boy was not in the proper environment under his mother's care and that he was being deprived of certain fatherly privileges with the boy.

Q. Doctor what do you recall as to Mr. Witbeck's demeanor, that is, his general attitude, as you observed it?

A. You mean as to any particular one?

Q. Towards any particular persons?

A. Well it was sufficient to cause most of the friends that I have mentioned earlier in this statement to be afraid of him; afraid of what he would do either personally to them or to his wife or boy.

and correct. He would start out on this main idea but would be side tracked by something and in a short time that would then become the main issue with him. He was really unable to rationally follow out any definite or reasonable project. This condition existed to such extent that if I had had any work that I wanted carefully and accurately done I would not have given it to him. No matter what education and ability he might have he did not have the stability to do the work and was not dependable or reliable in carrying it out.

Q. Could you tell us about how frequently you observed Mr. Witbeck after 1928, the year he was in jail?

A. No, sir; I really don't remember. I have numerous small notes that were not put into the record, but it was infrequent. It might have been that many months would go by when I would not see Mr. Witbeck and then probably I would see him twice in a week. It was very irregular.

Q. When you did see him what did you observe as to the progress of his condition?

284 A. I considered his case to be progressively worse. On one occasion he came to see me——

Q. (Interrupting.) Let me interrupt you a moment. State any specific instance that you recall.

A. Well, I do not recall the months nor year but Mr. Witbeck came to me on more than one occasion concerning his family matters and with the thought that he was going to get things straightened out and leading me to at least hope that he was. However, it probably would not be more than two days before I would find the same condition was persisting.

Q. What was the condition?

A. The disturbance at the home and concerning his wife's position in the Christian Science Church and her responsibility for the records that she thought he had destroyed, but which he evidently had not.

Q. What do you know with reference to him destroying records of that character, insofar as your own knowledge is concerned?

A. Well, the actual facts were that his wife reported to me in considerable alarm that he had destroyed the letter files and her church records. When his wife advised me of this he came voluntarily to the office and admitted. He said that he had not done so, that those were just duplicates. He told us that he had retained the originals and told us where they were to be found. I do not remember where the place was but I think it was somewhere at his house.

Mr. FAY. Defendant objects to the answer and asks it be
285 stricken as not within the personal knowledge of the witness.

Mr. MILLER:

Q. Was he not particularly suspicious when you examined him?

A. Markedly so.

Q. Just describe for the purpose of the record, in order that the jury back in Washington may get a word picture of his condition as you personally observed it. Doctor, what you now recall about him from personal observation. In other words, let us have as good a word picture of his condition as it is possible for you to give.

A. I might find it a little difficult to give in words a picture of Mr. Witbeck, of his type. In brief summary I will say he was a man of marked intellectual and educational attainments; a man who was rather ambitious and wished to go far in his profession; a man who was markedly suspicious of his business associates, professional associates, and of his family, also his neighbors. He would exhibit that by doing things that the normal man would not be expected to do, such as peeping over transoms, cutting holes and boring holes through walls and ceilings through which to peep, reading his friends' correspondence without their permission in order to see if he could find something interesting to himself. All of these things he admitted to me, personally, and talked to me about. He gave as his reason——

Q. (Interrupting.) That was while he was consulting
286 you, when you had him in charge?

A. Yes; in jail. He gave as his reason, mainly, the fact that he did not think his wife should have the full custody in the rearing of the boy. At that time I think that the boy was about thirteen years old and he felt or claimed to feel that the boy was not in the proper environment under his mother's care and that he was being deprived of certain fatherly privileges with the boy.

Q. Doctor what do you recall as to Mr. Witbeck's demeanor, that is, his general attitude, as you observed it?

A. You mean as to any particular one?

Q. Towards any particular persons?

A. Well it was sufficient to cause most of the friends that I have mentioned earlier in this statement to be afraid of him; afraid of what he would do either personally to them or to his wife or boy.

Q. Was he over-bearing?

A. I would consider that he was, yes, sir.

Q. Doctor what is a constitutional psychiatric inferiority?

A. Well that is not a definite entity but as we refer to it we call those individuals constitutional psychiatric inferiority, which in our language plainly means that those persons are not a true psychosis or true legal insanity cases but they are practically always in conflict with society or probably in conflict with
287 the law; that they do not seem to adjust themselves to the normal ways of society.

Q. What was your diagnosis of Mr. Witbeck?

A. Constitutional inferiority with emotional instability and compensatory reactions.

Q. What do you mean by emotional instability, Doctor?

A. That he was very emotional and unstable, particularly at that time, at the time of his emotional reactions.

Q. And by compensatory reactions what do you mean?

A. He made an earnest effort at times to overcome it in some other way, by show of manhood or show of spirit or show of ability of some kind, which he did not really possess. Sometimes a show of a type that would instill fear in those he probably loved most.

Q. And these efforts were evidence of what kind of mind?

A. Unstable.

Q. Doctor, what is meant by a positive Babinski?

A. That refers to a certain reflex or nervous jerk that is somewhat accentuated in some types of nervous cases.

Q. Did you find such in Mr. Witbeck?

A. I do not remember. I would have to refer to the record. I think it was a positive.

Q. Right up here [indicating portion of diagnosis on page P-1C].

A. Yes; he did have an accentuated reflex called positive.

Q. Doctor what would that indicate to you with reference to the central nervous system of Mr. Witbeck in December of 1928?

288 A. Some changes probably occurred in the central nervous system to make him more nervous, exhibit a more nervous reaction.

Q. What do you mean by organic change, Doctor?

A. In this particular instance it would really refer to an actual disease of organs that he had. In Mr. Witbeck's particular case it was a sinus infection of some of the skull sinuses. I do not remember just which ones but I remember he did have it.

Q. As time went on would an organic change of the central nervous system, such as was beginning when you first examined Mr. Witbeck on December 13th, 1928, have a tendency to decrease or not?

Mr. FAY. Defendant objects to the question as leading.

The WITNESS. We would expect progressive deterioration.

Mr. MILLER:

Q. Doctor, state whether or not the condition that you found in Mr. Witbeck on December 13th, 1928, indicated a deterioration.

Mr. FAY. Same objection.

The WITNESS. I think it tended to have a deteriorating effect on the central nervous system.

Mr. MILLER:

Q. Is deterioration of the central nervous system a progressive and permanent condition?

289 A. Not necessarily but I think it was in this case.

Q. Doctor, I notice that in this report you state that his ego was rather marked. Just what did you mean by that?

A. He had ideas of unusual ability and exaggerated—I don't know exactly how to express it, but he had exaggerated ideas of his ability, the things he could do. Whatever he did was just the best.

Q. What did you mean by a delusional trend?

A. Well, we mean this. A delusional trend we refer to in this way; if a person, for example, has a hallucination as to something being wrong with the participation of one or more of the five special senses; if he imagines things that are not true. But delusion refers to a false belief that one firmly and positively believes, a thing that is not true but that is a fixed idea.

290 Q. What effect did his mental condition, as you observed it, Doctor, have upon his ability to work?

A. I think it simply interfered with his doing any work of any dependability or doing dependably anything that he started out to do.

Cross-examination by Mr. FAY:

Q. When was the first time that you came in contact with Mr. Witbeck?

A. Insofar as I remember, the first time was on the 3rd of December, 1928. It is possible that I knew him before and had seen him but not in a professional way.

291 Q. At that time, Doctor, what was your opinion as to the personality of the man?

A. I did not form any opinion definitely for the first two or three days. I simply had him placed in jail in order to keep him under observation and my opinion formed as time went by, as I observed him. My first impression of him was that I was dealing with a very astute, keen mind, an educated man, and so rather inclined to the belief right from the beginning that I had better look very carefully at this because perhaps a mistake had been made, because he was so intelligent.

Q. What was his demeanor? Was he domineering at the time you first met him?

A. What?

Q. Was he domineering at the time you first met him?

A. No, sir, not with me. He was never particularly domineering with me. His attitude with me was one of a sort of questioning attitude and a little argumentative.

Q. At that time, in December, 1928, Doctor, do you know of your own knowledge whether or not Mr. Witbeck was working?

A. No, sir; only until I inquired from some of these parties whom I have mentioned. I did not know, myself.

Q. Did you later ascertain, Doctor, that Mr. Whitbeck was working in 1929 or thereabout?

A. I do not remember the time but as time went on I
292 heard that he had in the past worked either with or for Mr. Snyder and Mr. Roy. Just the exact character of that work I do not recall. I think it was engineering work though; perhaps something connected with the oil industry.

Q. Doctor, you spoke about the diagnosis constitutional psychiatric inferiority. That does not mean an inferiority type of man, does it, Doctor?

A. No, sir. It may be sometimes found in people of a very superior type of education.

Q. Was that so in this particular case, Doctor?

A. Yes, sir.

Q. Dr. Butler, is it not true that one of the biggest incentives that a constitutional psychiatric inferiority has is to further his own personal ideas and wishes?

A. I think that is very common.

Q. And in so doing, Doctor, is it not true that invariably such types will harm those who are close to them in order to further their own wishes and desires?

A. That depends a great deal upon the individual that is a constitutional psychiatric inferiority. His own natural bent is

probably accentuated. If he would be inclined that way why then he might be more so, if he is a CPI.

Q. Was that the case in the instant case, Doctor?

A. I do not know. I did not know him before sufficiently
293 to make that comparison. I could only go by the history of his family that he had been a rather good husband and father in the beginning, as husbands and fathers go. Then this condition gradually grew on him and they gradually noticed it more until the climax was reached and he was placed in jail. How long a time that was I do not know.

Q. After he had been in jail do you know of your own knowledge, Doctor, whether or not he received treatment in Washington from the Veterans' Administration?

A. Not of my own knowledge but only from information received that he had gone there to receive attention in the hospital at Washington. I did not know just what that was.

Q. Do you know if he returned to Shreveport, Doctor?

A. I am not just exactly clear on these dates but it is my impression that I did see him after he returned. However, just when, I do not know.

Q. Can you recall now whether or not you considered his condition as improved upon his return?

A. No, I did not think it was improved. As I observed it and as I remembered it, I did not think so because it was along about that time he was making complaints about the spinal puncture trouble; during the time he was in Washington and then when he came back. In fact I do not know how long he was up there or just when he came back. I do not remember those things.

Q. Doctor do you know of any employment that he had
294 after he came back from Washington in 1929?

A. Not any that I recall.

Q. What do you think of his ability to write a book or several books?

A. I think that Mr. Witbeck, being in his mental condition, as well as his mental attainment, could probably write almost brilliantly upon some subjects. In fact I know of instances right here in Shreveport where that has happened with men who have actually been interdicted but who have written very acceptable books of law. I do not care to mention any names for the record. Those things are done.

Q. Doctor, did you know as a fact that Mr. Witbeck did write several biographies?

A. I heard so, but I did not see any of them.

Q. Dr. Butler what do you think of Mr. Witbeck's ability to testify as an expert witness as a civil engineer, which was his profession?

A. I think it would be rather probable that a man of his attainment might do so very efficiently at times, but if it were too prolonged, I would think that there would probably be a break somewhere.

Q. Do you know, Doctor, for a fact that Mr. Witbeck did testify in May, 1933, in the case of the Sabine Lumber Company versus A. J. Broderick and George Calvert in the United
295 States District Court for the Western District of Louisiana?

A. No, sir; I did not know.

Q. Do you know if Mr. Witbeck drove a car in 1930, 1931, 1932, and 1933, Doctor?

A. No, sir; I do not know.

Q. What was his physical build from the time you knew him in December, 1928, until his death?

A. There was very little change, insofar as I recall. Mr. Witbeck was a man of average size or a little bit less than average height, I would say. He was rather compactly built, not stout, and well proportioned. If I was going to guess I would say he was a man about five feet eight or nine inches tall and weighed probably one hundred sixty pounds. That would be my guess as I saw him last.

Q. Do you think that during those years, Doctor, he was capable of doing manual labor?

A. I think of a type he could have. I found nothing in his physical examination, laboratory work or observation, to the effect that he could not do the physical work that a man of sedentary habits, of his type of work, could do.

Q. Do you think that he might have been able to do bookkeeping at that time?

A. Yes; I think he could have done something of that kind, that is, from a physical standpoint.

Q. Considering it from a physical and mental standpoint,
296 Doctor, he could have performed any type of light manual labor at all?

A. Well, that is pretty hard to say, because I do not know just how light manual labor might be considered.

Q. For instance, Doctor, do you know anything about farming?

A. Very little.

Q. Have you not a general idea of what the duties are on a small farm?

A. I think so.

Q. Do you think Mr. Witbeck could have performed those duties?

A. He might have done some light gardening, on his own terms, but I would not want to rely upon the work or products.

Q. Do you think he could have taken care of a few geese, hogs, and chickens?

A. Well, I really think that from his physical condition, as I saw it, there was no reason why he might not have engaged in some light work. I think that could have been done but I doubt his dependability to do it and carry it out.

Q. If somebody was overseeing the work, Doctor, and taking care that it was done the way he wanted, do you not think it would have been possible for Mr. Witbeck to do it?

A. Yes; if it was the way that Mr. Witbeck wanted it to be. He would not have cooperated otherwise, I do not think. He was not a man very much given to taking orders, working under
297 someone else or the direction of someone else, in my opinion. I think that Mr. Witbeck could have done it if he would do it.

Q. If he had had his own farm do you think it would have been possible for him to do it?

A. I do not know that I could answer that. In fact I cannot see Mr. Witbeck doing anything of that kind. He was not a man of that character or type; he was not a man who appealed to me to be desirous of doing manual labor of that kind. Physically I think he could have done it but from the standpoint of desire I hardly think he would have done it.

Q. What would have been the effect if he did do it, physically and mentally; particularly mentally?

A. Probably helped him physically. If he could have gotten his mind on something and kept it there it would have helped him—if he would have done it.

Q. Did you know, Doctor, that he was quite interested in books or history?

A. Yes, sir; he claimed that himself.

Q. Did he keep quite a library?

A. He told me that he had quite a collection of very valuable books, and one of his worries when I was questioning him was how to properly care for and display those books. I did not see the books but from what he told me, and from what his wife verified, he did have a rather valuable collection;
298 at least, in his opinion it was a very valuable collection of books. He was very proud of them and very anxious about their safety.

Q. Doctor, where was he living at that time, if you know?

A. The address as given me on the day he was placed in jail was 1610 Creswell Street in the City of Shreveport.

Q. Do you know that district, Doctor?

A. Yes.

Q. Is it nice?

A. Very nice residential district, yes; apartment houses, rent houses and homes.

Q. Do you know the cause of Mr. Witbeck's death?

A. No, sir. In fact I did not know of his death until some time after it occurred and I don't remember when I heard it or of what he died. It seems I was told but I made no record of it. In fact I do not know where he died.

Q. Doctor, do you ever prescribe institutional change for constitutional Psychiatric inferiority?

A. Yes, sir. If the man is an ex-service man we try to get them into one of the veterans' institutions. If they are not, we sometimes refer them to one of the several private institutions. If they are not in those classes, we sometimes ask state institutions to accept them.

Q. What is the result obtained from this treatment?

A. I do not believe I am in position to state as I have not
299 followed it up. It would be pure guess and I do not wish to do that.

Q. Do you think it is fairly good?

A. Offhand I think I could refer to a few cases that the institution has benefited, and I probably know of any number of cases that did not get into institutions that are still lingering on. Time seems to be the main element with some as much as treatment.

Q. Doctor, do you know cases of CPI that are following occupations today?

A. Well, I could not say offhand but I have no doubt there are many of them.

Redirect examination by Mr. MILLER:

Q. Doctor, you have stated that time is as much an element as treatment. What did you mean by that?

A. I am speaking of it from a medical standpoint. That is about the best way I can get my prognosis. We have to wait until time has gone by because these cases vary so much in individuals that we do not like to put them as a class.

Q. Then summarizing, your testimony is to the effect that from a physical standpoint Witbeck was able to work but from a mental standpoint he was not?

A. Yes. I do not think he would have been dependable or reliable for the work.

Mrs. LUCY C. MATHEWS, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. MILLER:

Q. State your name, residence, and occupation, please.

A. Lucy C. Mathews. Residence 325 Washington Street, Shreveport, Louisiana.

Q. And your occupation?

A. Housewife.

Q. And your approximate age, if you do not mind.

A. I am sixty-eight.

Q. Mrs. Mathews, did you know Albert Tyler Witbeck who lived here in Shreveport some years ago?

A. Oh, yes, quite well.

Q. Did you know his wife?

A. Very well.

Q. Mrs. Mathews, about when did you first know them?

A. I knew him in a business way. I was deputy in the Clerk's office and knew him in a business way about eight or ten years ago, I believe.

Q. About what years were those, approximately?

A. Let's see, I was deputy—that was all of eight years ago. It was during the prior Clerk's tenure of office that I was deputy, and I knew Mr. Witbeck in a business way.

Q. Inviting your attention to the fall of 1932 and the summer of 1932, did you know him at that time?

A. The summer and fall of 1932? Well, yes.

Q. Just tell us in your own words what you recall now with respect to Mr. Witbeck's actions, demeanor, attitude, and condition as you personally observed them in the summer and fall of 1932.

A. Well it was one of a man whose mind was so intensively centered on himself that he could think of nothing else than something that would make him the great somebody stirring up a commotion in which he would be the central figure, and he did not seem to care even if it was in a way that was not at all com-

plimentary just so it was himself. In all of his conversations it was to get ahead of somebody or catch somebody and trip them, and he had this and that on the other fellow, and he had a very vivid imagination. To my thought, he just could not think of anything but himself.

Q. Inviting your attention to the summer and fall of 1932, Mrs. Mathews, tell us what specific things you remember about Mr. Witbeck. Just some specific things.

302 A. Well the things that seem specific to me are * * * leaving threatening letters.

Mr. FAY. With whom did he leave threatening letters?

A. On my porch; and he afterwards told me he was the one that left it.

Mr. FAY. Defendant objects to the answer and moves it be stricken on the ground that it is not within the knowledge of the witness.

Mr. MILLER:

Q. Were these things that you have just mentioned matters of which you have personal knowledge?

A. Well I looked up—I heard a step and I looked up and I felt sure I saw him. He afterwards admitted to me that it was he.

I did not ask him about it. He told me that I had been in
303 some very tight places. The very night that such a letter had been left on my porch when I was lying on the couch in my living room, he said, "I was right there and you were in a very dangerous spot." Now that is as near as I can say that it is from personal knowledge.

Mr. FAY. Defendant objects to the answer and moves it be stricken as hearsay.

Mr. MILLER:

Q. Tell us in your own knowledge some instance that you personally know of in which Mr. Witbeck was involved.

A. Well the time that it seems to me he was at his worst was when I was librarian in an office in the Slattery Building. He came every morning into my office and made threats that certain things would befall me that I would be sorry for if I did not do certain things. The thing he wanted was the address of his former wife, who had left him. I had that address. She had asked me not to give it to him and I told him I would not give it. I had promised not to give it to him. He tried to get that address by leaving with me a small package to mail and I told him I would mail it for him. However, when I saw it was marked registered

mail I knew that it would be easy enough for him to trace the address, so I did not mail it.

He came in about the second or third day and asked me if I had mailed it and I told him I had not and why I had not. At that he went into the greatest rage you ever saw. He said, "I especially pronounce on you every curse of death," and I laughed and said, "Mr. Witbeck you know there isn't anything like that." He said, "Do you remember Mrs. Bush that was involved in this case?" I said, "Yes, I do." He said, "She is dead, isn't she?" I said, "Yes." I said, "You do not claim to have had any part in that, do you?"

Mr. FAY. Defendant now objects to the conversation and moves it be stricken.

Mr. MILLER:

Q. Just state in your own words what you personally observed about him with reference to this registered package.

A. He threatened to have me arrested.

Q. All right.

A. He threatened to have me arrested. So we went over to the postoffice. He claimed it was a matter for the federal government and we went to the postoffice and had an interview with the postmaster, who at that time was Carey T. Duncan. It was in his office that he made his complaints.

Q. You mean Mr. Witbeck.

A. Mr. Witbeck made his complaints to the postmaster and raved and made all sorts of accusations. I said I wished to return the package and I wanted a receipt for it. He said I would either have to mail it or he certainly would have me arrested.

Mr. Duncan told him he positively could not do so. So he gave me a receipt for the package and I returned it to him.

Q. On other occasions than that did he become angry within your personal observation.

A. There was so much crowded into those few months or two or three years [thinking]. I do not recall just in that period, right now.

Q. By that period what do you mean? Do you mean just prior to September, 1932?

A. Yes; September, 1932.

Q. And this other occurred at that time?

A. Yes.

Q. During the period after September, 1932, tell us what you personally observed?

A. No, about the package to be mailed was in the spring of 1933 because that was after I was elected librarian. I was elected librarian in January and this occurred right after I went in and that is the reason I can place it so clearly. It was the spring of 1933.

Q. What else do you recall about Mr. Witbeck's condition as you personally observed it in the fall of 1932? That is, several months before you were elected librarian, if you can recall.

A. Well his intense nervous restlessness to be at something. It looked as though he could hardly hold himself together at all.

306 Q. Would he appear suspicious at times?

A. Suspicious of everybody.

Mr. FAY. Defendant objects to the question as leading and moves that the answer be stricken.

Mr. MILLER:

Q. Let me ask you this question. Just state in your own words what else you recall about him at that time?

A. Well, if there was one word in the English language that would cover it it would be suspicious of everything and everybody, his most intimate friends. He suspected them all and preached it to everybody.

Q. What things do you remember him doing which lead you to believe that he was suspicious? Little things that you can remember.

A. Well, me, for instance. He said I broke up his home. Just gave me fits about it. I was associated with Mrs. Witbeck in this way. We were both on the board of directors of our church. She had no automobile and I called for her every time we had a meeting. He always came out to the car if I didn't go inside and he was watching and waiting and suspicious. He afterwards said he didn't believe we ever went to any board meeting, that he believed she and I were conniving around. I laughed.

Mr. FAY. Defendant objects to the conversation as to what he believed and moves that part of the answer be stricken.

307 Mr. MILLER. Just tell in your own words what else you recall about him.

A. The evening that he was so violent the sheriff advised her not to go back home.

Mr. FAY. Defendant objects to what the sheriff advised Mrs. Witbeck and moves it be stricken.

Mr. MILLER:

Q. Go ahead and tell in your own words.

A. She came by here, my office downstairs, and left the copies for me to take to the board meeting for she would not be there. I took the minutes to the meeting. He arrived down there alone at the board meeting in a great flurry, just wild, and said, "Was Mrs. Witbeck there?" I said, "No". You are asking me for conversation again.

Q. Describe as best you now recall Mr. Witbeck's appearance before the Board.

Mr. FAY. Defendant objects to the question as leading.

The WITNESS. He came into our church and parted the curtains and came in there. "Where is my wife? Where is she?" I said, "I do not know." The next morning he came to the——

Q. (Interrupting.) How did he appear? What do you recall about his demeanor before the Board and how he acted when he came in there?

Mr. FAY. Objected to as leading.

308 Mr. MILLER:

Q. Can you describe his appearance to us?

A. Just like a man very, very excited. Just very excited; very excited.

Q. Did he appear to be nervous?

Mr. FAY. Object to the question as leading.

Mr. MILLER:

Q. What else do you remember in his appearance before the Board?

A. He turned and went right out.

Q. Do you remember about his appearance there last night, the way he appeared to you when you looked at him?

A. Well, he looked like a man beside himself, almost, with something. I didn't know what. I didn't know what was the force back of it.

Q. When you looked at him can you tell what you saw? Tell what you observed about him. As best you can, give us a word picture of the way he looked when he come pushing in.

A. Well, he was wild, frantic.

Q. Wild and frantic in his demeanor. Based on the facts to which you have testified here today, Mrs. Mathews, without any hearsay testimony or what other people told you, purely based on what you have testified here today, your personal observation

of Mr. Witbeck, in your opinion was his conduct rational or irrational in 1932?

309 A. Irrational; very irrational.

Q. Based on those facts alone, as stated by you here today, as you personally observed them, in 1932, did Mr. Witbeck in your opinion have such measure of intelligence, understanding, memory, and judgment as to enable him to understand the nature and effect of his actions?

Mr. FAY. Defendant objects to the question as calling for a conclusion beyond the personal knowledge of the witness.

Mr. MILLER:

Q. Answer the question. [Previous question read to witness.]

A. That is a pretty big question.

Q. I withdraw that question. Let me ask this question for the record. Based on your observation of Mr. Witbeck, as you have testified here today, will you just tell us what you observed as to his stability?

Mr. FAY. Defendant objects to the question as leading.

The WITNESS. He did not have any stability. He was as erratic as could be. He would go off at that tangent, go off at this tangent; start at this and go at something else.

Q. What do you mean by going off at a tangent? Just describe more fully for the record so the jury will get your exact idea.

A. Well, I expect that wasn't very understandable. He would follow one line of procedure very intensively to a
310 certain point but prior to reaching that point his mind veered off at an angle and he was as intensively following some procedure that was diametrically opposed to what he started to do before. My english is not very good.

Q. That is perfectly all right. That is fine. In your opinion, on the occasions when you observed Mr. Witbeck, did he appear to be sane or insane?

Mr. FAY. Defendant objects to the question as calling for a conclusion of the witness.

The WITNESS. On occasions?

Mr. MILLER:

Q. Yes.

A. There were many occasions when he most certainly was insane. On two occasions while sitting in my car in front of her home he drove up in a great hurry, such a hurry that he would break right into it. I do not mean a wreck but just that he

tore up and stopped and said bad words, and then sent his son around to call his mother names, dreadful names.

Mr. FAY. Defendant objects to the answer and moves it be stricken as not responsive to the question.

Mr. MILLER:

Q. When did the foregoing occur?

A. The fall of 1932 and along in the spring and summer of 1932.

Q. These are matters of your own personal knowledge?

311 A. Yes.

Cross examination by Mr. FAY:

Q. How long did you know Mr. Witbeck, Mrs. Mathews?

A. I think I gave that answer once before. I knew him in a business way.

Q. Was that the first time you knew him, about 1930 or 1931?

A. No; but not personal contact with him to any degree. I had met him, been introduced to him, and would just speak. I came in contact with him first in a business way, as I said, in the Clerk's office. I was deputy clerk in the Clerk's office.

Q. Yes.

A. And then I came in contact with him in the home. I was in the home a very few times, on occasions when I would call for his wife and she would not be ready to go.

Q. I think I can shorten it a bit. Was that around 1930 or just what is your recollection now? 1930 or 1931?

A. 1930 or 1931? Not when I first knew him. I knew him prior to that time.

Q. How long prior to that time?

A. Well that was when I began to know him better in my office work.

Q. When you first knew Mr. Witbeck did you consider him as a very jealous person?

312 A. When I first knew him our entire relations were in a business way and the home problem, home relationship, never did come up until later.

Q. All right, in your business discourse with him did you consider him to be an overbearing individual?

A. Yes. Yes, very.

Q. A dominating individual?

A. Very. He brooked no opposition. What he said was not to be questioned by anyone, regardless of what their standing.

Q. Did you know what his business was at that time, Mrs. Mathews?

A. Always that of a civil engineer, insofar as I knew. I did not know he had any other business.

Q. Knowing him as you did would you believe him capable of writing a book?

A. On some topics, yes.

Q. Would you believe him capable of being an expert witness as a civil engineer?

A. Well, of course, I, myself, of my knowledge, would not know about that.

Q. That is all I want to know.

A. Of my own knowledge I knew nothing of his ability.

Q. Do you know of any work that he performed or any jobs of surveying that he did after you got to know him pretty well around 1931 or 1932?

A. I knew nothing at all about his business. There are
313 civil engineers here who could give you that information.

Mr. Van Os, of an architectural firm here, was a great friend of his. He knew a great deal about his business affairs.

Q. Would you call Mr. Witbeck a very eccentric individual?

A. Yes; very. Very.

Q. When did Mrs. Witbeck leave Shreveport, if you know, Mrs. Mathews; approximately when?

A. Well, some time in '33.

Q. Do you remember whether it would be the spring or summer or fall?

A. It was right along during the spring; late spring or early summer. It was right along at that time when I was having trouble about sending the package.

Q. Did you know Mrs. Witbeck was going to be married at that time?

A. Yes.

Q. To whom was she to be married?

A. Mr. Fairly.

Q. Did you have any participation in the divorce proceedings between Mrs. Witbeck and Mr. Witbeck?

A. No.

Q. Did you know them at that time?

A. Yes; I was with her in the courtroom at all the court proceedings.

Q. Did Mr. Witbeck testify in those proceedings, do you recall?

314 A. Once, I think. Once, I feel sure; possibly twice. I feel sure of once.

Redirect examination by Mr. MILLER:

Q. Was there a time when Mrs. Witbeck stayed with you?

A. She came to my mother's home.

Q. The answer is yes?

A. Yes.

Q. State the circumstance under which this occurred.

A. The night Sheriff Hughes advised her not to go home until they got in touch with him. When I got home from that afore-said board meeting she was there with her little son.

315 Mrs. MARGUERITE CARLTON BLANE, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. MILLER:

Q. State your name, address, and occupation, please.

A. Mrs. Marguerite Carlton Blane; 235 Atkins; school teacher.

Q. Did you know Mr. and Mrs. Albert Tyler Witbeck?

A. Yes; I did.

Q. About when did you know them?

A. Well I knew his wife over a longer period of time than I did Mr. Witbeck. I knew Mrs. Witbeck from about 1926.

Q. And about how long did you know Mr. Witbeck?

A. I only knew him, I would say, for about two years.

Q. When was that approximately, the best you can state?

A. Two or three years, I would say. From about 1931 to 1933, up to the time that he died.

Q. Inviting your attention to a period in 1932, approximately the summer or fall, what, if anything, do you now recall with reference to him?

A. I remember him coming to the front door and when she
316 went to the front door sometimes he would be so bold as to put his foot into the front door and force his way into the house. He would come into the house and stay for several hours at a time, and I was very much afraid to leave her alone with him. I never would leave the house and leave her alone in the room with him.

Mr. FAY. Defendant moves that the first part of the answer be stricken as not within the knowledge of the witness.

Mr. MILLER:

Q. What else do you recall about Mr. Witbeck's actions as you personally observed them during this period of time?

A. Well I answered the door bell on several occasions when he came to call and I observed the look in his eyes, a wild, staring

look, and him insisting that he see my aunt when I would try to get him to leave.

Q. Did he appear rational or irrational on these occasions that you have mentioned?

A. Well I would say irrational.

Mr. FAY. Defendant objects to the question and moves that the answer be stricken.

Mr. MILLER:

Q. Why did you insist upon staying in the room with your aunt when he was there?

A. Because I was afraid. I had observed enough of his looks and his actions during the time that I would be in the room when he would come in (and I had heard enough of what he had
317 to say to be afraid for her.)

Q. State any other thing that you may recall and that you have not mentioned with reference to Mr. Witbeck covering the period from the summer of 1932 until his death.

A. Well I had driven my aunt over to his house on several occasions to see him and to see the young son, who was with him.

Q. What did you notice about him on those occasions, if you recall?

A. Well I didn't have the opportunity to see him. However, I sat outside. I would not leave her there; I never left.

Mr. FAY. Defendant objects to the spontaneous explanation of the witness as no question was pending, and moves that it be stricken.

318 Mr. FAY. No questions.

(It is stipulated by and between counsel for plaintiffs and counsel for defendant that the signature of this witness be and the same hereby is waived.)

Mrs. ELLA C. LEVY, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. MILLER:

Q. Mrs. Levy, will you state your name, address, and occupation, please?

A. Ella C. Levy; Ella Carlton Levy. Address, 235 Atkins Avenue. I am a housewife; I keep the home. Not a housewife; I am a widow.

Q. Your approximate age?

A. I am sixty-five.

Q. Mrs. Levy, did you know Albert Tyler Witbeck?

A. Yes; I did.

Q. Over what period of time?

A. Well, I knew him by sight a few years before they separated. I think they separated in 1928, if I remember correctly. Then in 1928 I came in closer contact with him. He knew I was a very good friend of his wife; but I never had very much in common or contact with him.

319 Q. Did you know him from then until the time of his death in 1933?

A. I did.

Q. I invite your attention to the summer and fall of 1932. Will you just tell us in your own words, Mrs. Levy, what you now recall about things that you observed with reference to Mr. Witbeck?

A. Well, it seemed that he realized that I was a very good friend of his wife and through that friendship he tried to reach her. That was his motive. It seemed that he wanted through me to reach his wife, and he would call me up and hold me on the telephone for thirty minutes at a time. At that time I believe she was married or had married—I don't remember just the time. I think she had married Mr. Fairly. I would say, "Mr. Witbeck, it is awful hot here in this hall and I cannot talk any longer."

Mr. Fay. Just a minute. Defendant objects to the conversation and moves that it be stricken.

Mr. MILLER:

Q. Just go right ahead.

A. I could not persuade him to say good-bye and hang up the phone. I had to hang it up in his face. I would get loose from the phone and in ten minutes or as short a time as he could get there he would be at my front door ringing the door bell.

320 His eyes were wild and glaring looking, he was in his shirt sleeves and he wanted to come in to talk to me, and I didn't or wouldn't let him. Very often then he would come back again, and it was the same thing over again. Then his boy C. W., Bill, as they called him, would ring up and tell me he wanted to come. He had this child to ring up and he would bring the child out there. Naturally, being a friend of the child's mother, I let the child in. He would come on and say, "I will call back in a few minutes or a little while," and so he would come and just push himself against the door and come in, and there he would sit and talk. Just a conversation of wild and woolly tales about

Mrs. Witbeck coming back, etc., and so on. Told me he was going to separate them. Do you want to ask me questions or shall I go on?

Q. Tell us what else you recall that occurred, as to what he did and what you did, back there in the summer and fall of 1932.

A. '32?

Q. Yes.

A. Same thing over again. He called me over a period of—I don't know—I expect it was three years. He always tried to force himself in on me and on my nieces. When they were in the home they were actually afraid for him to come.

Mr. FAX. Defendant objects to the testimony as to the nieces being afraid and moves that it be stricken.

321 Mr. MILLER:

Q. Was there a time when Mr. Witbeck's wife called you on the telephone?

A. Yes.

Q. Tell us about when that was, if you recall, and what you recall about that occasion.

A. Yes.

Q. About when was that?

A. I think, the best of my recollection, it was in 1932. The air was let out of her tire in front of the church, which was not very far from my house, and she had called up and had the filling station, not very far around, take care of it and she had driven around to that filling station.

Q. You saw her there yourself?

A. At the filling station?

Q. At the filling station.

A. Yes; a little later. She called me over the telephone stating that she was there at this filling station and Mr. Witbeck was driving around, around and around it and she was afraid to leave. She said, "I don't have five cents in my purse but will you, please, call the police and see if they will come here?" So I did.

Mr. FAX. Defendant objects to what Mrs. Witneck asked her and moves that it be stricken.

322 Mr. MILLER:

Q. As a result of receiving the phone call from Mrs. Witbeck tell us just what you did.

A. I called the police. My nephew at that time was there and they thought Mr. Witbeck would not know his car, so we got in his car and drove up there and I saw Mr. Witbeck driving

around the filling station. He drove around and stayed around until the police did come and followed her. The police followed her home and we followed the police.

Q. About when was that?

A. To the best of my recollection it was in the summer of 1932.

Q. Mrs. Levy what else do you recall with reference to Mr. Witbeck's appearance or demeanor or actions in the summer and fall of 1932?

A. 1932?

Q. Yes.

A. Well it was that same calling over the telephone.

Q. Do you recall any other occasion about Mr. Witbeck, with the approximate date of things?

A. Yes; I recall in 1933 that he came over to my door and I answered the door bell. I went to it and he asked me if I would not wire his wife, Mrs. Fairly, to come, that their son was losing his sight, was going blind.

Mr. FAY. Defendant objects to the conversation and
323 moves that it be stricken.

Mr. MILLER:

Q. Go ahead, Mrs. Levy.

A. He wanted me to come over and verify it. So I hesitated. He came two or three times. I don't remember how many, and finally I did go. In the meantime I got a message from Mrs. Fairly to go see that child and ascertain if he really was ill. I went over. My niece brought me over and waited for me and I went in. He was at that time living in the garage apartment of R. O. Marks. I remember that year because he passed out. I remember him being there because that is the only year I went. I went in and the child was not very ill, what I would call ill. He did have a little fever but was up in a little while.

Q. If you recall anything else about Mr. Witbeck's appearance just state what it was and approximately when you noticed it.

A. I would hate to tell some things. He was so untidy and when I would open the door I could smell perspiration on his body.

Q. Did you notice his eyes? If so, what about them?

A. Yes.

Mr. FAY. Objected to.

Mr. MILLER. I will reframe the question.

Q. State what else you recall about him.

A. He acted like an insane man then.

Mr. FAY. Defendant objects to the conclusion of the witness.

324 The WITNESS. I know how one acts. I was absolutely afraid of him.

Mr. FAY. Defendant objects to the answer and moves that it be stricken.

Mr. MILLER:

Q. Just describe how Mr. Witbeck acted in order that the jury back in Washington may know.

A. Well his conversation was never on one subject. It was just wild. He was always telling me some things that had happened down on the streets, things that would be of no interest to me or anyone in my home, and although I tried to push him out the best I could I never could get him out. He was always threatening people with a curse and things like that.

Q. What do you recall about the language he would use?

Mr. FAY. Defendant objects to the question as leading.

Mr. MILLER. I will reframe the question.

Q. State what else you recall about him.

A. Well I don't use the kind of language I heard him use, but he always seem to have—he did have respect for me; he seemed to. However, he did not have respect for some of my friends or some of her friends.

325 Q. You mentioned a moment ago about Mr. Witbeck being untidy. Can you describe with a little more exactness in what manner?

A. Shirt sleeves; collar unbuttoned; perspiration so that it looked like he hadn't changed his shirt in a week. He looked dirty, if you know what that is, and he smelled dirty. The odor would come in my face when I would open the door and stand in front of him, and I was glad when he would leave.

Q. About how long would he stay when he would come?

A. Just as long as I would let him. I have closed the door in his face many times but he would come back the next day, maybe, or the next day. I just hated to hang up the receiver in the man's face but I did finally do that. However, that did not have any effect. He was just absolutely—you just couldn't insult him.

Mr. FAY: Defendant objects to the answer and moves that the latter part of it be stricken as not responsive.

Mr. MILLER:

Q. What else do you recall about his condition? Go ahead.

A. That is just about all I know now. He just did not take offense but would just go right on. I would tell him a half dozen

times that it was too hot in the hall to talk and I would try to get away from the phone when he was talking, and I am not exaggerating it when I say that he would hold me there thirty minutes.

326 Cross examination by Mr. FAY:

Q. How often would you see Mr. Witbeck during the course of a month, at any time, we will say?

A. Well, now [hesitating].

Q. Did you see him once a month, five times a month, ten times a month?

A. Sometimes I would and then again he would lay off a spell. He would quit and I would think, "Well we have gotten rid of Witbeck."

Q. Do you know what he was doing during the time you would not see him?

A. No.

Q. Of your own knowledge?

A. No. Sometimes I think he was out of town.

Q. Would you see him more than ten times a month, do you think?

A. No; I don't think so.

Q. When would you usually see him, what part of the day?

A. In the afternoons, as a rule, and he would ring up in the morning, afternoon, noon or any other time.

Q. Did he drive a car during 1930, 1931, 1932, and 1933?

A. Yes, Mr. Witbeck always had a car, I think.

Q. What kind of car was it, if you know?

A. I do not know.

327 Q. Did you ever ride in the car when he was driving?

A. No.

Q. Did Mrs. Witbeck ride in the car when he was driving, if you know? Did you ever see her?

A. I could not say. I don't remember whether I have seen her in the car with him. I knew Mr. Witbeck slightly before they separated; very slightly.

Q. When did they separate, if you know?

A. I believe it was in 1928.

Q. Were you a witness in the divorce proceedings?

A. No.

Q. How far did you live from Mr. and Mrs. Witbeck?

A. Well they lived on Creswell, 1620, and I live at 235 Atkins Avenue, not far from Centenary, if you know where that is. Now your guess is as good as mine.

Q. For the purpose of the record can you tell approximately how many blocks it would be? Was it ten, twenty, or thirty?

A. Now let's see [thinking].

Q. To the best of your knowledge.

A. I live at 235 Atkins. Don't you know Shreveport?

Q. I don't live in Shreveport. I am from Washington.

A. Oh, I didn't know. I expect it is a mile and a half. I think it is half way to town. I think I live about three miles out, and my guess would be about half way.

328 Q. Do you remember when Mrs. Fairly left the city—Mrs. Witbeck?

A. Yes. I don't remember the date but I knew.

Q. Do you remember the year?

A. No, I cannot. She told me what she was going to do and she slipped away.

Q. It was before Mr. Witbeck died though?

A. Oh, yes.

Q. Would you say it was a year before he died or six months?

A. I expect it was a year.

Q. About a year.

A. Maybe nine months. About a year, I expect. The dates I am not so good on.

Q. Do you know of any positions that Mr. Witbeck held during the time that you knew him?

A. Well I think he was a civil engineer here and I think he did some work. He did some work for Mr. George Dutton during that time, I think.

Q. Did you know of Mr. Witbeck writing any books?

A. No, I did not.

Q. Did you know of Mr. Witbeck testifying as an expert witness in the Western District Federal Court?

A. No.

Q. In 1933.

A. No. All of those things would be hearsay if I heard them.

Q. I just wanted to know if you personally knew.

329 A. No; I do not.

Q. Can you give me an idea of approximately how much time you would see Mr. Witbeck during a period of one month? Would it be as much as ten hours?

A. I couldn't say. Just as much as I would allow, that is how much.

Q. That is so indefinite. I will ask you to try to give something for the record.

A. No, I don't believe that much; not ten hours.

Q. It would not be ten hours during one month?

A. No.

Q. Would it be five hours, do you think?

A. Well I would think so.

(It is stipulated by and between counsel for plaintiffs and counsel for defendant that the signature of this witness be and the same hereby is waived.)

MRS. CARRIE M. HENRY, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination by Mr. MILLER:

Q. State your name, residence, and occupation.

A. My residence is 2102 Highland Avenue and I am a home maker.

330 Q. Approximate age.

A. Sixty-one.

Q. Did you know Mr. Albert Tyler Witbeck?

A. Yes.

Q. Over what period of time did you know him, approximately?

A. Well, I lived within a block of his residence for three years. I do not know but approximately eight or ten years. I knew his wife before and it was not very long after I knew the wife before I knew him. It must have been ten or twelve years, possibly.

Q. And what years were they?

A. Well, now, I just [hesitating].

Q. Assuming that he died December 12th, 1933.

A. Well, it would have been twelve years. Just do a little subtraction and you will get it.

Q. Mrs. Henry, did you have an opportunity to observe Mr. Witbeck in 1932 and 1933?

A. Yes.

Q. About how frequently would you see him during those years?

A. Well, more frequently than I desired because he was most annoying.

Q. About how often would you see him?

A. Well, sometimes it was by telephoning and calling at the door and if he would see me on the street downtown, and just any other opportunity.

331 Q. How often a month, could you say?

A. Well, I could not say, it would be so frequent. Maybe it would be every few days and maybe it would be a week or two

or two or three weeks. I do not know how often but it was very frequent.

Q. Directing your attention to the summer and fall of 1932. will you tell me in your own words what you now recall about Mr. Witbeck from your personal observation?

A. I can tell you about one time he called me up all excited, said that his little boy was very, very ill. He and his wife were separated at that time and she was very, very afraid of him, and he wanted me to do something about calling her and telling her. I called a neighbor, because I didn't want to go over there by myself. She took me in her car and we drove. It was a short distance. I went in the side entrance to this place unannounced and knocked on the bedroom door. It opened on this entrance and he opened the door very much surprised at my coming, because he hadn't asked that.

Mr. FAY. Defendant objects to the conversation in the answer and moves that it be stricken.

332 Mr. MILLER:

Q. Go ahead.

A. The child was a big boy. He was fully dressed—

Q. (Interruption.) Just tell us what you observed when you opened the door.

A. When Mr. Witbeck opened the door the boy was lying on the bed. I went over and put my hand on him and said, "What's the matter?" He mumbled something.

Mr. FAY. Defendant objects to the conclusion and asks that it be stricken.

The WITNESS. Shall I proceed?

Mr. MILLER:

Q. What did you observe as to Mr. Witbeck at that time?

A. He was very untidy. The room was in an awful condition.

Q. What did you observe about the room at that time?

Mr. FAY. Defendant objects to the question as leading.

Mr. MILLER:

Q. You may answer.

A. Well, it was very untidy. You would wonder how human beings could stay in it.

Q. Did Mr. Witbeck seem surprised to see you?

A. Very much so.

Q. In what manner did he appear to be untidy?

333 Mr. FAY: Defendant objects to the question as leading.

The WITNESS. Shall I answer?

Mr. MILLER:

Q. Yes.

A. His shirt was very much soiled, the collar was wide open, and his sleeves were all dangling, and every other appearance of untidyness.

Q. What did he want you to do, if anything, at that time?

A. He didn't want me to do anything because he didn't want me over there.

Q. State what you recall about any other occasion when you saw Mr. Witbeck in 1932.

A. One day he came to my door. Many times he would come over, and I decided that I didn't think it was safe to let him in any more. So this particular day when I opened the door, there was a fastening on the screen. I reached up and fastened the screen. He wanted to come in and I told him no, that I didn't have time to see him. I was very kind and he looked at me with a stare that was nothing but fiendish. I was alone in the house and very grateful for the protection of the screen door.

Q. About when was this?

A. That must have been some time in 1932. It was after the other experience. I recall that.

Q. By the other experience you mean when you went to his room?

334 A. To his room, yes.

Q. What else do you recall on this occasion when he came to your door and you did not let him in?

A. It was erratic statements; contradictory.

Q. You mean he would make them?

A. Yes. Erratic statements in this way. He would have something dreadful to tell me about his wife but the object of his visits was to do something to have her be reunited with him.

Q. Then what do you recall, if anything, with respect to the training he gave his son, who was with him at that time?

A. Oh, that was just shameful. He just took that boy and told him the most unthinkable things about the mother.

Mr. FAY. Defendant objects to the answer and moves that it be stricken as not within the knowledge of the witness.

Mr. MILLER:

Q. Tell us some incident, if you know of any, which showed to you the training that Mr. Witbeck gave his son.

Mr. FAY. Object to the question as leading.

The WITNESS: Well he told the boy that his mother stole things out of the house.

Mr. FAY. Object as to what he told.

The WITNESS: I heard him say that in the presence of the boy, and he also said she was a crook. I remember that.

Mr. MILLER:

Q. Did he cause the boy to do anything, to your knowledge, that seemed to you to be unreasonable? If so, what?

A. Well I will tell you what he did to me, and I know that he trained this boy to do this because he afterwards said so. The boy had a way or ringing up and making very insulting remarks to me.

Q. You mean over the telephone?

A. Yes; very insulting remarks to me. At this particular time when I had all of this to contend with I felt I could not stand it and I told him, "Listen, C. W., don't call my telephone again. If you do I will have you arrested." The very next day Mr. Witbeck was down at a friend's home and he said, "C. W. is certainly telling it to them now." And the boy had called this friend and he didn't know that she had been called by this kind of conversation.

Mr. FAY. Defendant objects to the conversation.

Mr. MILLER:

Q. Do you recall any other incident at that time, one which you have not related, which seemed unusual to you, with respect to Mr. Witbeck?

A. Well there are just so many things that I know about. It seemed to me that every time I saw Mr. Witbeck there was something new. I know that he spared no means whatever in torturing and tormenting his wife's friends and his friends by telephoning and by obnoxious visits. I know he did that from my personal experience with him. I was very kind to him.

Mr. FAY. Defendant objects to the generalities of the answer and moves that it be stricken.

Mr. MILLER:

Q. Did he appear rational or irrational?

A. Erratic statements.

Mr. FAY. Defendant objects to the question and moves that the answer be stricken.

Mr. MILLER:

Q. Did he appear rational or irrational?

A. Very irrational.

Mr. FAY. Defendant objects to the question and moves that the answer be stricken.

Mr. MILLER:

Q. Did he appear to be a sane man or an insane man on the occasions when you observed him?

Mr. FAY. Defendant objects to the question.

The WITNESS. As I have related about him coming to my door, that morning I got in my mind his facial expression and the stare in his eyes, and it indicated to me that he was not himself, so much so that I would not have been surprised at
337 any time for something to have happened to his mentality in a moment. In fact I know that it was a very perverted mentality.

Mr. MILLER:

Q. How do you know that?

A. From personal experience and conversations and the fiendish things he would teach that boy to do.

Cross examination by Mr. FAY:

Q. Did Mr. Witbeck always drive a car?

A. Not always.

Q. Since you have known him?

A. No; he did not; not always. He drove a car and I have ridden some with him; ridden in the car when he was driving.

Q. To the best of your knowledge when did he first own a car?

A. I could not say.

Q. Did he own one in 1930?

A. In which?

Q. 1930.

A. I could not say.

Q. Do you know if he had a car in 1933, right before he died?

A. No; I could not say that. But there was just as much craziness in his driving as there was in anything else. The driving was not steady and you did not feel very secure.

Q. How long over a period of a month would you see
338 him? Would you say ten hours, twenty hours, thirty hours?

A. What do you mean by those periods? Altogether? No; I didn't give that much time to Mr. Witbeck.

Q. Did you see him five hours?

A. I could not say. Possibly so in the period of a month. The fact of the business is that I avoided him all I could.

Q. What is that?

A. I avoided him all I could. His presence was forced upon me.

Q. You do not know what he was doing when you did not see him, do you? Of your own knowledge, I mean.

A. Of my own knowledge there weren't many days, I don't suppose, that I didn't see him, particularly if I went downtown.

Q. How long did you see him at those times, five minutes or an hour?

A. I would pass him on the street and say, "How do you do", or run into him and stop for a talk. He wasn't employed in any business.

Q. What was his occupation?

A. He had been an engineer but he had not done any work for a long, long time.

Q. Is that of your own knowledge?

A. Yes; I know that he had not.

Q. Do you know if he ever wrote any books?

A. No; I do not.

339 Q. What is that?

A. I say I do not. He liked books very much.

Q. Did he have quite a library?

A. Yes.

Q. What, if anything, did he specialize in?

A. Not any particular thing. He had gathered together those valuable books and took great pride in them.

Q. Was he a stamp collector, to your knowledge?

A. No; not that I know of.

Q. Did you know of Mr. Witbeck testifying in the federal court in 1933, the spring of 1933, as an expert witness?

A. No.

Q. Were you present during the divorce proceedings in 1928?

A. No.

Q. Do you know what the purpose of this litigation is, Mrs. Henry?

A. Oh, something about some insurance. I do not know the details of it.

Q. Do you know who is trying to recover the insurance?

A. No. I do not know whether it is the wife or mother or son or all three of them. I have no definite knowledge of that.

Redirect examination by Mr. MILLER:

340 Q. You have stated that Mr. Witbeck was as crazy driving as anything else. I wish you would just amplify that a

little bit and describe how Mr. Witbeck would drive when you were riding with him.

A. I have never driven a car and cannot give you any mechanical reasons, except that his driving was jerky and no care in turning corners, and he speeded up and then slowed.

Q. What was the reason that you did not feel safe when riding with him?

A. Just because you would not feel safe if you thought somebody was not right. Understand that those times were thrust upon me; I could not do otherwise. I could not avoid it or I would not have done so.

Q. When you say you did not feel he was right what did you mean by the word "right"?

A. He was not mentally balanced. That is the word.

Recross examination by Mr. FAY:

Q. Do you know of any accidents that Mr. Witbeck had when he was driving a car?

A. No; I had no way of knowing whether he had any or not.

Q. Would you say that Mr. Witbeck was an able-bodied man?

A. He certainly was.

Q. Physically?

A. Certainly was, insofar as I know.

351 Dr. J. M. GORTON, being sworn by the notary, to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination by Mr. FAY:

Q. Will you state your name and occupation?

A. J. M. Gorton, physician.

Q. Where are you located?

A. Shreveport, Louisiana, Medical Arts Building. I have been practicing thirty years, graduate of Vanderbilt University 1909.

Q. All that time have you been in Shreveport, Louisiana?

A. No; in Louisiana, but I have been in Shreveport only since 1920.

Q. Since 1920 you have been in general practice in Shreveport?

A. Yes.

Q. Doctor have you since 1920, had occasion to meet A. T. Witbeck?

A. Yes; I knew Witbeck.

Q. When did you first meet him, Doctor, as best you recollect?

A. I am not certain, about '21 I think.

Q. Since 1921 you knew Mr. Witbeck until his death, Doctor?

A. Yes.

352 Q. The first connection you had with Mr. Witbeck; was that social or professionally?

A. Socially.

Q. Did Mr. Witbeck ever contact you in a professional manner?

A. Many times.

Q. Do you recall approximately when was the first time?

A. No; I cannot, but it was probably within the first two years of our acquaintance.

Q. Approximately around 1923 or 1924?

A. Yes.

Q. Then Doctor how often would you have occasion since 1923 or 1924 up until the date of the death of Mr. Witbeck to treat him professionally, approximately?

A. Once or twice a year.

Q. What did you treat him for, Doctor, as you remember?

A. Most occasions was for colds and bronchial condition.

Q. Were you what is generally known as Mr. Witbeck's family physician, Doctor?

A. Yes.

Q. Doctor do you have any independent recollection of an examination of Mr. Witbeck in August—in August 1933?

A. If that is the examination with regard to the time he had his last illness I can.

Q. No; that is not the one I refer to—

353 A. I don't know what time you are talking about.

Q. Then, Doctor, I will hand you Defendant's Exhibit A and will ask you if that is your signature thereon? [Presenting document to the witness.]

A. Yes.

Q. Now refer to Defendant's Exhibit A for identification, will you refresh your recollection and tell me what the examination consisted of that you made in August 1933?

A. Yes; I remember it now, yes.

Q. Will you state what your findings were at that time, Doctor?

A. Well, the man had a chronic condition of his chest which I diagnosed as chronic, diffused bronchitis with moderate emphysema, and I made a statement there (it was possibly bronchiectasis); of course that condition is only diagnosed by X-ray, and generally not then unless lipiodin or some other substance is injected into the bronchial tubes.

Q. Then, Doctor, do you recall the next time you had occasion to examine Mr. Witbeck, referring specifically to the examination a few days before his death?

A. Yes; I can recall a good deal of that.

Q. What was that in relation to, Doctor?

A. That was in relation to appendicitis.

Q. Did Mr. Witbeck call you?

A. Yes; he came to my office.

354 Q. Did you make a thorough examination of him at that time?

A. Yes.

Q. What was your diagnosis upon that examination, Doctor?

A. Acute appendicitis.

Q. What did you recommend for it, Doctor?

A. Operation.

Q. If you know, Doctor, who performed that appendectomy on Mr. Witbeck?

A. Dr. J. C. Willis, Jr.

Q. Did you assist in the operation, Doctor?

A. No.

Q. Do you know of your own knowledge what the result of the operation was, do you know?

A. Yes.

Q. What was that result, Doctor?

A. He removed a pus appendix and the man died.

Q. If you know, what was the cause of death, Doctor?

A. I don't know.

Q. Now, Doctor, did you have occasion to know Mr. Witbeck aside from your professional treatment of him?

A. Yes; I think I did.

Q. During the time that you knew Mr. Witbeck did he ever perform any services for you as a civil engineer, Doctor?

A. Yes.

Q. Approximately when?

355 A. About 1925, he surveyed two lots, city lots for me.

Q. Were his services satisfactory at that time Doctor?

A. Yes.

Q. Then thereafter Doctor do you know of other work that Mr. Witbeck performed as a civil engineer?

A. I heard him make statements about other work he had done.

Q. What was your opinion Doctor at the time that Mr. Witbeck did that service for you as to the personality of the man?

A. Well I knew enough about him to know that he was very peculiar, headstrong, arbitrary and contrary but I had every confidence in his engineering ability.

Q. Then did that personality which you just referred to in the above question continue throughout his lifetime to your knowledge, Doctor?

A. Yes; it did.

Q. Did that personality interfere with his work as a civil engineer?

A. It didn't interfere with his work except in this instance that the probability was that some people would not give him a job on account of knowing him to be a peculiar, headstrong, arbitrary individual, but the work that he did he got through friends that knew him well, could get along with him—they gave him work and were satisfied, his work always stood up, it always stood up.

356 Mr. MILLER. I move to strike that portion of the witness' answer beginning with "but the work that he could get through friends who knew him" and so forth to the end of the Doctor's answer to the preceding question for the reason it is not responsive to the question, and the answer is a voluntary statement on part of the Doctor, and it is not shown that the statement is based wholly upon personal observation by the witness but obviously is based upon hearsay.

Q. Do you know of your own knowledge if Mr. Witbeck performed services for other persons beside yourself from 1925 to the date of his death?

A. I don't know when he did his last work, I don't know when the last piece of work was done, but I do know that he did do work for different people at different times, but when he did his last job I don't know.

Q. Doctor did you know of Mr. Witbeck's interest in books, particularly history?

A. Yes.

Q. What did you think of Mr. Witbeck's ability to write a book, or books, Doctor?

Mr. MILLER. I object to that question, first, for the reason it is vague, indefinite and uncertain;

Second, for the reason that the type of book or books
357 is not indicated;

Third, for the reason that the experience and knowledge of whatever subject might be under discussion in such book or books that Mr. Witbeck may or may not have written, of this witness

is not shown and the jury will not have opportunity to judge the qualifications of this witness to pass his opinion upon this, what this witness might feel and what some other witness might feel who was an engineer, something of that kind if it should be on an engineering line, that Mr. Witbeck may or may not have written a book, the proper foundation is not laid and this witness is not qualified as an expert, and for these reasons we object.

Q. Doctor, do you know if Mr. Witbeck did write any books?

A. No; I don't know whether he did or not.

Q. In your opinion, Doctor, did you consider Mr. Witbeck capable of writing a book?

Mr. MILLER. Objected to for the reasons set forth in the objection just given, which for the sake of brevity will not be repeated here.

Q. Do you know——

Mr. FAY. Read the question please.

(Reporter reads.)

A. I will answer it this way, I don't know whether he was capable of writing a book or not, but I think Mr. Witbeck was capable
358 of writing interesting articles on some specific things, and I know that he gathered data about certain things and submitted same. I believe it was the Smithsonian Institute in Washington, he submitted it somewhere, and I saw some that he submitted; now as to how accurate the stuff he submitted was, I don't know.

Mr. MILLER. I move to strike that portion of the witness' answer beginning with the words "But I think Mr. Witbeck was capable" and so forth, to the end of his answer for the reason it is not responsive to the question, and for other reasons appearing in the record.

Q. What do you know of Mr. Witbeck's interest in research?

Mr. MILLER. I object to the question unless the Doctor knows of his own personal knowledge and not what someone, including Mr. Witbeck himself may have told him.

A. Mr. Witbeck visited in my home on numerous occasions and discussed with me questions involving Indian lore and showed me letters that he had received from time to time requesting any information he might secure about matters of this nature and he stated that he made those investigations and answered his correspondence.

Q. Doctor, did you consider Mr. Witbeck to be a highly eccentric individual?

A. Absolutely.

Q. Did you consider Mr. Witbeck to be insane?

Mr. MILLER. I object to the question for reasons to be assigned at the trial of the case.

359 A. That covers a lot of territory; I am not a neurologist or an expert *phychiatrist* I may say, and I did not consider Mr. Witbeck insane, but I considered Mr. Witbeck a very unusual, temperamental, eccentric, hardheaded, arbitrary individual that was very, very hard to get along with.

Q. Doctor, have you in your experience of over thirty years in medicine had occasion to see other individuals of the same temperament and personality of Mr. Witbeck who were able to perform different occupations?

A. I don't think I ever knew anybody like Witbeck.

Q. Well, Doctor, do you know of other individuals who had the characteristics of Mr. Witbeck, referring particularly to his domineering, overbearing, insane jealousy and such traits who were able to perform occupations in this life?

A. As I said, I never saw anybody that had all of the characteristics of Witbeck; I have seen people that had some of them.

Q. Then, Doctor, did you, yourself, consider Mr. Witbeck capable of performing some occupation?

A. Absolutely.

Q. Up until the date of his death?

Mr. MILLER. I object to the question as leading, where he said "did you consider him capable of performing some occupation"—I object to the question as grossly leading, irrelevant, immaterial,

invades the province of the jury, and other reasons to be
360 assigned at the trial of the case, and I now move to strike the answer for the reasons given to the previous question.

Q. State whether or not, Doctor, you considered Mr. Witbeck capable of performing some work up until the date of his death?

Mr. MILLER. I object to the question for reasons previously assigned.

A. Yes.

Mr. MILLER. I move to strike the answer for the reasons assigned.

Q. Doctor to your knowledge did Mr. Witbeck's temperament and personality interfere materially with his work as a civil engineer as long as he was self-employed?

Mr. MILLER. I object to the question for the reason it is vague, indefinite, and uncertain, also as a conclusion of the witness, and invades the province of the jury and other reasons to be assigned at the trial.

A. What do you mean by "self-employed"?

Q. Doctor, as long as he was performing independent jobs we will say?

A. You mean——

Q. I mean if he obtained a job. Doctor——

Mr. MILLER. I object to this question for the reason it is vague, indefinite, uncertain, highly speculative, argumentative, invades the province of the jury, and other reasons to be assigned at
361 the trial of the case.

A. Any job that he took he could perform efficiently.

Mr. MILLER. I move to strike the answer for the reasons assigned in the previous objection.

Mr. MILLER. I move to strike the answer for the same reasons stated.

Q. Doctor, did you consider the physical disability of Mr. Witbeck such as would interfere with his occupation?

A. Yes.

Q. To what extent, Doctor?

A. He was not physically fit to work in bad weather on account of his chronic lung condition.

Q. Did you ever make a diagnosis of tuberculosis of Mr. Witbeck, Doctor?

362 A. No.

Q. Are you related to Mr. Witbeck?

A. No, sir.

Q. Do you have any interest whatsoever in this case Doctor?

A. Not a particle.

Q. Doctor, did you consider Mr. Witbeck a normal individual aside from his idiosyncrasies at the time that you examined him in 1933 both in August and November?

A. No.

Q. In what way was he abnormal, Doctor?

A. He had a chronic pulmonary conditions that was a physical handicap, and he was an excitable, eccentric, nervous type of individual which to my mind is not normal.

Q. Based on your experience as a general practitioner of over thirty years, Doctor, did you consider Mr. Witbeck to be an insane person?

A. No.

(Witness tendered.)

Cross examination by Mr. MILLER:

Without waiving any objections plaintiff may make at the time of the trial or otherwise to any testimony of this Doctor, the following questions are asked on cross-examination.

Q. Now, Doctor, do you mean that he was always sane whenever you saw him in your opinion?

363 A. Yes.

Q. Doctor, was the information which you testified about on direct examination obtained by you in attending Mr. Witbeck as a patient in your professional capacity and information which was necessary to enable you to act in that capacity as his family physician?

A. Yes; partially that way, and possibly through my intimate association with him in my home because he spent many, many evenings there, he had no place to go and he would just come and stay two and three hours at the time, take supper sometimes, stay two and three hours.

Q. Over what period was it that he came and stayed; do you know what years?

A. Well, I imagine seven, eight, or ten years possibly, back and forth, he didn't live in the house, just passing at night and if we were in the living room he would come in, we just treated him like a member of the family, if we were going out anywhere we would tell him he could stay and listen to the radio and we would go on, and finally he and his wife separated and after that, of course, he had more time away from home.

Q. As a matter of fact it is almost impossible to segregate your testimony as given on direct examination which was based on information which you acquired in attending Mr. Witbeck as a patient, in your professional capacity which information was given you by him and which you personally observed when
364 you saw him for the purpose of acting in your professional capacity, and the information which you acquired socially; was it not?

A. Yes; I will answer that this way; all of the physical examinations made of him when he was consulting me were purely with reference to the lung condition and things of that kind; I never attempted to make a psychoanalysis of the man.

Q. And your testimony here has largely been as a medical expert rather than as a layman?

A. Yes.

Q. Do you recall when Mr. Witbeck was arrested on a warrant for insanity executed by Dr. Butler?

A. I recall the incident but not the date.

Q. Was Mr. Witbeck your patient at that time, or do you recall?

A. He was not anybody's patient at that time.

Q. Do you recall when he was sent to the Diagnostic Center of the United States Veterans' Hospital around February 20, 1929, after conference of the coroner, Dr. Butler, and other persons here in Shreveport?

A. No.

Q. Did you ever notice him suffer from psychoneurosis, in your opinion, Doctor?

A. I don't know whether he suffered from psychoneurosis or not, as I have repeatedly stated in answering your questions, this man was a most unusual type of fellow, eccentric in every respect and exhibited unusual characteristics
365 seemed take the position that was unreasonable, that might mean he had some psychoneurosis or something.

Q. You are not an expert in that line?

A. No; I don't really know if it could be classified as that or not.

Q. Do you recall him being markedly apprehensive at times?

A. I don't know that I do—I know this, that he was very suspicious of people, but I don't think he was scared of anybody.

Q. And did he become irritable at times and fly into a rage on slight provocation?

A. Oh, yes.

Q. You personally observed that?

A. Yes.

Q. Did he seem to tire easily when he worked or did you observe him at work sufficiently to know?

A. I could not say about that.

Q. Didn't there seem to be a slowing up of his work in his latter years on earth, Doctor?

A. He did less work but I don't think that was due to the fact that he was less capable, I think there was just less work.

Q. Did he seem to lose his self-confidence?

A. No; he did not.

Q. He was rather egotistical in other words?

366 A. Yes; generally right about everything.

Q. In other words he could not stand to be crossed by some one having different ideas to his?

A. No.

Q. When crossed he would fly off the handle, as the common expression goes, is that right?

A. Yes.

Q. Did that condition just stated continue to any greater degree in the latter years of his life?

A. I saw no difference.

Q. Did you ever recommend hospitalization for him, Doctor, for his mental condition?

A. No; not that I recall, to the best of my knowledge I did not.

Q. What is your present opinion now as to whether hospitalization might have been helpful for his mental condition back in 1932 and 1933, or have you an opinion?

A. Well, so far as I know he was in a psychopathic ward at Walter Reed Hospital, stayed I don't know how long, but a good while, and they discharged him as not being of any benefit to him, and when he came back he was about like he was when he went up there.

Q. That was around 1929?

A. I don't know, sometime before his death.

Q. Was that not Mt. Alto?

A. I don't know, he was in Walter Reed Hospital at one time for examination, that may have been the one.

367 Q. Doctor, did you know about Mr. Witbeck having myocardia, a heart condition?

A. I don't know whether I have a record on that or not, I can not recall right off hand whether we ever thought he had that or not.

Q. Did you ever make an electric cardiograph or have one made of his heart, do you recall?

A. I didn't make any because I refer that work to others, I don't recall that he ever had one made, I just don't know about that.

Q. Do you have your office records here, Doctor, showing the dates that Mr. Witbeck consulted you and what his condition was on those dates?

A. No; I don't.

Q. You didn't keep that record?

A. I do keep records, but in this particular case the man died and in cleaning up the office things we go through and a lot of those things are thrown away, we kept them for two or three years and then they were destroyed, I had no idea anything like this would ever come up and didn't keep the records.

Q. You have a pretty busy practice here in Shreveport?

A. Yes.

Q. And have probably as many as a hundred patients at the time?

A. No; I never had a hundred at one time.

368 Q. You have treated several hundred patients since you last saw Mr. Witbeck in 1933, have you not?

A. Yes.

Q. And as time goes on things slip more and more from one's memory don't they Doctor?

A. Yes; details, sure.

Q. Your knowledge as to Mr. Witbeck's interest in books, particularly history, was based entirely upon what he told you when you talked with him?

A. Yes; discussions we would have around the fireside.

Q. Did you ever have occasion since 1931 to personally observe Mr. Witbeck working?

A. No.

Q. In your conversations with Mr. Witbeck from time to time do you now recall how he would when talking on a subject digress from that subject and go on to something else entirely foreign to that?

A. I never heard him do that a single time.

Q. In your opinion, Doctor, would the average normal individual who would have work for Mr. Witbeck to do, who was a stranger to him, be apt to employ him?

A. I cannot answer that question.

Q. In your opinion would he have difficulty in obtaining work from strangers who didn't know him, because of his peculiarities?

369 A. No; I think he would do better, likely get work from those that didn't know anything about him.

Q. Did you say on direct examination something about him having a hard time getting a job, like the Gulf, something like that, what did you mean by that?

A. Well, I didn't have anything specific in mind—what I had in mind probably was that he was well known here in town by all the oil people, large companies who used civil engineers and having had a job with the Potter Palmer people and having lost it on account of his contrariness, I might say, and failure to carry out orders, that naturally the other companies had that information and just didn't want to be bothered with him.

Q. What did you mean when you mentioned his eccentricities, Doctor, on direct examination?

A. Well, what I meant by that was, that he had strong likes and dislikes, and would form opinions of people that I didn't think and others didn't think was fair, but he would just form his opinion from perhaps some little thing somebody might say or do that didn't amount to anything, he was very sensitive; and another eccentricity was like this, he would see a boy driving along at night, see a couple in an automobile and the boy might

have his arm around the girl, hugging her, he would just follow him for hours and hours, just for curiosity, things you and I would not do, he just had a supersleuth complex, he just did those things.

370 Q. Did you ever visit in his home?

A. I have been there professionally several times, but never socially.

Q. Do you recall the cracks he had in the walls so he could peep out over into the house adjoining, matters such as that?

A. Yes; I remember about that.

Q. He seemed to feel that he was a super detective for the whole community in that respect, rather curious about other people's business?

A. Yes; if he thought something was going on at the next house that he didn't approve he just tried to get the dope on them.

Q. And people generally on the streets here in Shreveport who lived here a number of years all knew of these peculiarities, it was a matter of common knowledge——

Mr. FAY. I object to the question.

Redirect examination by Mr. FAY:

Q. Doctor, your testimony on direct examination was based on information as an expert as well as information obtained in your social connection?

A. Yes.

Q. Was there less work open to Mr. Witbeck in his latter years, Doctor?

A. Yes.

Q. Why, Doctor?

371 A. Less work open for everybody.

Q. Because of what?

A. Depression.

Q. Did you ever see Mr. Witbeck's library, Doctor—did you know that he was a collector of books?

A. Oh, yes.

Q. Did you ever see his library?

A. Casually looked it over, never any specific interest in it.

Q. Do you know if he drove a car?

A. Yes.

Q. Do you know how long he drove a car?

Mr. MILLER. I object to this question for the reason it is not a proper redirect examination, has nothing to do with the cross-examination.

A. No, I don't, he had a car for four or five years.

Q. Did he have it up to shortly before his death, Doctor?

A. I suppose it was within a year of his death, really I don't know whether he had a car when he died or not, I don't know.

Q. Did he consider himself a sleuth because of his experience with the Intelligence Department during the War?

A. He told me he was connected with that service in France.

Q. Do you know why he lost out with the Potter Palmer Company when he was working there?

A. Failing to take orders——

372 Mr. FAY. I offer defendant's Exhibit "A" for identification, to be attached to this deposition.

Recross examination by Mr. MILLER:

Q. Doctor in view of this defendant's Exhibit "A" which has just been introduced, I will ask you to state whether in your opinion on August 24, 1933, Albert T. Witbeck was suffering from a permanent condition which was then incurable, in your opinion?

A. Yes.

Q. How long, Doctor, in your opinion, had he been suffering from a permanent incurable condition before August 24, 1933, would you say?

A. Well, this condition begun when he was in Service.

Q. That was about fourteen (14) years previous ——

A. It was during 1917-1918.

Q. Mr. Fay asked you about your knowledge as to Mr. Witbeck's collection of books; is it not a fact that upon his death you or your wife were given some of those books in part payment of your bill or fee, or do you recall?

A. Nothing was given us for any part payment on anything, he gave me just as a friend a collection of old volumes that pertained to the early christian church.

Q. That was before his death?

A. No; I don't know if just before his death or right at his death. I have a set of books, old volumes pertaining to
373 the early christian religion that was given me by Mr. Witbeck or his son.

Redirect examination by Mr. FAY:

Q. What condition did you refer to as permanent?

A. The chronic bronchitis.

Recross examination by Mr. MILLER:

Q. What condition did you refer to as incurable?

A. Chronic bronchitis.

Deposition of the witness E. Wayles Browne, taken at his office at 12:20 P. M. after the said witness was duly sworn by the notary to tell the truth, the whole truth and nothing but the truth, who testified as follows:

Direct examination by Mr. Fay:

Q. Will you please state your name?

A. E. W. Browne, E. Wayles Browne.

Q. And your occupation?

A. Attorney at law.

374 Q. Your residence?

A. 934 Erie Street, Shreveport, Louisiana.

Q. Your business location?

A. Suite 709-15 Giddens-Lane Building.

Q. How long have you been a practicing attorney?

A. Since 1904.

Q. Did you have occasion to meet one A. T. Witbeck?

A. I did.

Q. When, Mr. Browne?

A. I don't remember even the year I first met him; I would say it would be at least ten years ago.

Q. That makes it approximately 1929?

A. About.

Q. How long did you know Mr. Witbeck thereafter?

A. I knew him until his death, but I don't recall now what year he died.

Q. The record shows December 1, 1933; would that be correct to the best of your knowledge?

A. Yes, I think that would be about the date.

Q. Was your connection with Mr. Witbeck social or in a business way?

A. In a business way generally.

Q. Approximately when did Mr. Witbeck come to see you in a business way?

375 A. At the time I was handling a case for his wife in the form of a suit for divorce; the records will disclose the dates of those proceedings; I just don't recall.

Q. If the records show it was December 1928, would that be approximately correct?

A. That is about my idea.

Q. On what business did Mr. Witbeck come to see you?

A. He and his wife were not living together harmoniously; they had a number of quarrels; as I recall it, she had left the home on one or more occasions; perhaps they have actually separated for

brief intervals and Mrs. Witbeck came to me to retain our firm in obtaining a divorce for her. As I recall it, Witbeck did not appear to be so averse to granting the divorce as long as he could have custody of the boy, although he appeared to be very jealous of his wife and everything she did.

Q. What became of that divorce proceeding?

A. She obtained a divorce on his failure to appear; later suit was brought to set the divorce aside, according to my recollection.

Q. Did you have conversations with him in regard to proceedings to set aside that divorce decree?

A. Not much, not many; as I recall it, Messrs. Cook & Cook represented Mrs. Witbeck in that proceeding.

Q. Then later, in 1932, were you representing the Sabine Lumber Company—

376 A. Yes—

Q. In some proceeding?

A. Our firm was of counsel in the suit of Broderick & Calvert against the Sabine Lumber Company involving a small tract of land which the plaintiffs claimed had been leased to them with outstanding good title in other parties.

Q. Did Mr. Witbeck testify as a witness in that case?

A. He did.

Q. What was the nature of his testimony?

A. As an expert civil engineer.

Q. Did you consider that Mr. Witbeck's testimony was helpful to the case?

A. I did.

Q. What was the result of the case, if you know?

A. The plaintiffs prevailed in the suit, recovering a judgment for damages against the defendant based on failure of title to the small tract upon which plaintiffs had drilled a well.

Q. And for which side did Mr. Witbeck testify?

A. He appeared for the plaintiffs in the case at our solicitation.

Q. What do you know of Mr. Witbeck's personality during the years 1929 to his death?

A. I would say that during my entire acquaintance with him he evinced a peculiar personality.

377 Q. What do you mean by peculiar?

A. One that would tend to antagonize those with whom he came in contact—egotistical, self-centered, and generally of such an egotistical character as to repel the public in talking with him.

Q. Did that personality exist at the time he testified in the Sabine Lumber Company case?

A. I am speaking only from recollection, but my impression is that it had somewhat softened at that time, that he was not quite as bombastic at the time he gave his testimony as he had been during prior periods.

Q. From your interviews with him and your connection did you consider Mr. Witbeck a highly eccentric individual?

A. I did; unusually so; he had one hobby that I recall of tracing Indian words. I have still in my possession some photostat copies of a great many Indian words used by the different Tribes that he had collected; he was rather a book collector, and at the time of his death I understood he had some very valuable books; and while those characteristics are not necessarily eccentric, they seemed a mark of unusual eccentricity with him because he seemed at the time to center his whole life on matters of that kind.

Q. Did you consider Mr. Witbeck a brilliant man?

A. I would say that in some ways he had intellect beyond the ordinary, beyond the average.

378 Q. From your observation as a layman did you consider Mr. Witbeck to be capable of performing some occupations up to the time of his death?

Mr. MILLER. I object to that question as irrelevant, immaterial, and incompetent, it invades the province of the court and jury, this witness has not been qualified as an expert, and it is vague, indefinite, and uncertain.

A. I could not say as to the period which elapsed for six months prior to his death or approximately the period prior to that, I am quite sure that Mr. Witbeck was capable of performing services for remuneration and in general of making a living.

Mr. MILLER. I move to strike the answer, first, for the reason that it is not responsive to the question; second, for the reason that it constitutes a voluntary statement on part of the witness; third, for the reason that it invades the province of the jury on the issue involved in this case and it is irrelevant, incompetent, and immaterial, and other reasons to be assigned at the trial of the case.

Q. Did you from the time you knew Mr. Witbeck until the time of the completion of the trial of the Sabine Lumber Company case consider Mr. Witbeck sane or insane?

Mr. MILLER. Same objection as previously assigned, which for the purpose of brevity will not be here repeated.

379 A. During that period it is my opinion as a layman that Mr. Witbeck was not what is generally referred to as being insane.

(Witness tendered.)

Cross-examination by Mr. MILLER:

Without waiving our rights to object to the entire testimony of this witness, plaintiff cross-examines the witness as follows:

Q. Mr. Browne, just what do you mean by "Mr. Witbeck was not what is generally referred to as being insane" in your answer to a previous question?

A. I meant that while he was eccentric that he did not conduct himself in the manner of a lunatic, or a man criminally insane, a man that was unbalanced, that would be violent or generally as a man of unbalanced mind would conduct himself.

Q. Mr. Browne, in your last answer where you state that Mr. Witbeck did not conduct himself in the manner of a lunatic or a man criminally insane, just what do you mean by that, and what has been your experience in dealings with lunatics and people criminally insane?

A. I have not had a great deal of experience. I have seen in the course of my life, and I would say, if asked for an illustration, he did not appear to me to be the type which are interdicted by the state because of insanity.

380 Q. In other words he didn't need to be locked up in order to keep him from injuring others in the community?

A. That's the statement I intended to make.

Q. Mr. Browne is it not a fact that you know right here in Shreveport of men walking around the streets who have not been interdicted or locked up you would consider as mentally incompetent?

A. Yes; I think there are some news boys or news men who have been considered mentally incompetent who have been selling newspapers but whose affliction appears to be more of the muscles, more muscular and due to lack of coordination between mind and muscles, lot of them in other towns like that.

Q. And aside from those you also know of some people walking around the streets whom you feel are mentally incompetent do you not?

A. I don't recall any right now.

Q. How about Louis Voelker?

A. I know old Louis, and I sometimes think Louis has more sense than he pretends to have.

Mr. FAY. Defendant objects and moves that the answer be stricken as not material to this issue.

Q. Do you feel that he is mentally competent?

Mr. FAY. Same objection.

A. It is not my opinion that Louis would be able to earn a living.

381 Q. Now coming to Mr. Witbeck during the last couple of years that he lived here in Shreveport Mr. Browne, the last two years of his life could he get jobs that he would be compensated for sufficient to make a living?

A. I will have to say I don't know because I rather lost contact with him after the Sabine Lumber Company case was tried; I saw him occasionally, probably oftener than occasionally but I don't know, although it is my impression that during the period which elapsed between the testimony he gave in that case and his death he did have some employment, I know he did during the period I knew him, I knew he made some surveys, seems to me made some government surveys.

Q. Can you name one job he had after he testified in the Sabine Lumber Company case?

A. No, I don't know, not one that had after that.

Q. And is it not a fact that his idiosyncrasies, eccentricities were such that it was difficult for him to be employed by persons having need for services of one like that?

A. It is quite probable that he stood in his own light in the matter of employment by not being able to get along with his superiors and those with whom he came in contact in his work.

Q. He didn't take kindly to following instruction of others did he in his work?

A. That is my impression of him.

382 Q. And he was quite egotistical in his own ideas of what should be done?

A. I think markedly so.

Q. And was he not rather suspicious of other people, or did you notice that?

A. He was very suspicious of some people.

Q. When anyone would cross him, by that I mean express ideas contrary to his, is it not a fact that he would become quite angry and do what some people call, fly off the handle easily?

A. I have seen him do that on numerous occasions, as far as I can recall now, however, they were before the trial of the case in which he appeared as a witness.

Q. Now in this case where you represented A. J. Broderick, the plaintiff, in which testimony was given by Mr. Witbeck the plaintiff's position was rather better than the defendant's before you started the trial was it not Mr. Browne?

A. At the time the suit was filed it was my opinion they had a difficult case, one of the chief difficulties being that of properly establishing the lines, there being also incidentally legal ques-

tions which rendered the case more difficult, and one of which finally disposed of it adversely to plaintiffs.

Q. Adversely to plaintiffs?

A. Yes; the Court of Appeal reversing Judge Dawkins on the strength of a case recently decided by the Supreme Court
383 that of Gulf Refining Company vs. Glassell, which held that mineral leases were not real rights in Louisiana and that, therefore, a suit for damages arising from a defective title, or from failure of title, could not be maintained by one who had not been physically evicted.

Q. So notwithstanding Mr. Witbeck's testimony in this case these plaintiffs in the case where he testified never collected a cent?

A. No; there was no recovery.

Q. Do you remember the case of Parish of Caddo vs. Parish of Bossier regarding Shreve Island in which Mr. Witbeck testified for the party that lost the case?

A. No; I don't remember that.

Mr. FAY. Defendant objects to the question and moves that the answer be stricken unless a foundation is laid for a fact that Mr. Witbeck did testify in the above-entitled case.

Q. You have no personal knowledge of your own Mr. Browne with reference to any income Mr. Witbeck may have had after the A. J. Broderick case you mentioned?

A. Not that I recall.

Q. Do you know what he received in that case for his compensation, for his services?

A. The only reason I cannot state is because I don't remember, we allowed him a substantial fee with expenses and per
384 diem.

Mr. MILLER. I move to strike the answer out after he said he didn't remember——

Mr. FAY. Defendant considers it very competent.

Q. Mr. Browne, as a matter of fact you do know that Mrs. Witbeck was working during this time for Mr. Williams during the last few years of Mr. Witbeck's life?

A. Yes over a large portion of the period I know she worked and earned a sufficient salary to practically support the family.

Q. And the family did live on her salary to the best of your knowledge?

Mr. FAY. Defendant objects to the question and moves that the answer be stricken, and for reasons to be given at the trial of the case.

A. I would say that at times the family did live off her salary.

Q. Do you remember what it was?

A. It was well over one hundred dollars, it seems at times she got one hundred and fifty, that is my recollection.

Q. That was per month?

A. Yes, per month.

Q. They didn't own their own home did they, or do you know about that?

385 A. I think they had an equity in it, my recollection is that they had bought it.

Q. Mr. Browne I believe you originally had a separation suit for Mrs. Witbeck against Mr. Witbeck?

A. The records are the best evidence, but I believe it was a suit for separation.

Q. And then you later abandoned that didn't you, or do you remember?

A. I don't remember.

Q. What I mean by that is, did you abandon further representation of Mrs. Witbeck?

A. Yes; after that judgment was obtained Mrs. Witbeck sought other counsel, I never knew the exact reason why, I suppose it may have been because the first judgment didn't grant her the custody of the boy and I will say here that the reason I didn't seek the custody of the boy was because I felt that if I did that judgment would never have been rendered by default.

Q. Now when you were representing Mrs. Witbeck is it not a fact that Mr. Witbeck just made a nuisance of himself coming in to see you?

A. I would say that he made quite a nuisance of himself, yes.

Q. And didn't that have some bearing on your desire not to continue to represent her, that is the time that he took up, you had to deal with him?

386 A. That was a very compensating factor.

Q. It was not very pleasant to have any dealings with Mr. Witbeck was it, Mr. Browne?

Mr. FAY. I object to the question as leading.

Q. Where he, himself personally was involved?

A. That might depend somewhat on the characteristics of the party having the dealings with him, but personally being a little high strung myself I found him somewhat unpleasant.

Q. You stated, as I recall, Mr. Browne on direct examination that "In some ways he [referring to Mr. Witbeck] had an intellect beyond the ordinary, beyond the average" now is it not true that

in some other ways that he was, that his intellect was quite warped compared to the ordinary?

A. I think so, I think that question of unusual memory could be placed to his highly developed egotism.

Q. When he would have those fits of anger as you described a short time ago, when he would, as we call it "fly off the handle" on those occasions didn't his actions almost border on what you have observed lunatics—the way lunatics or crazy people act?

Mr. FAY. Objected to as highly leading.

Mr. MILLER. Withdraw the question.

Q. Mr. Browne how else did those eccentricities develop that you personally observed, just describe in detail what you
387 remember about the various eccentricities of Mr. Witbeck?

A. He appeared to have the idea that the whole world was interested in his troubles, and especially the troubles between himself and wife. I don't recall any other marked eccentricities, but generally I would say that he was a type the members of which did not fully orient themselves to their surroundings.

Q. And this lack of orientation was both as to time and place in connection with his attitude to them?

A. I could not say as to that—what I meant to say was that he was inclined to think that he was of sufficient importance that people would revolve about him——

Q. In other words that he was the axis upon which all conditions should be revolved.

A. Yes.

Q. And do you recall his nervousness, when he would be nervous when you saw him the last two years of his life—by that I mean tremor on extending his fingers?

A. No, I don't recall, possibly I didn't see him close enough if he had such condition.

Q. Did he seem depressed the last two years of his life, or do you recall?

A. At times he was.

Q. Did you ever personally observe him at work for any
388 appreciable length of time at all?

A. I have seen him in his work clothes, with chain, but I never saw him in the field.

Q. And did you ever——

A. I have seen him do some writing and make some calculations that were necessary, particularly in connection with his testimony in the Sabine Lumber Company case.

Q. Did he seem to tire easily during that case?

A. My impression of him was that he never did tire, that he had that kind of nervous system that was keyed up all the time.

Q. He was nervous all the time?

A. He seemed to be tense all the time.

Q. He didn't seem to be able to relax himself?

A. He seemed to be more or less tense and I would say that he didn't seem to be relaxed.

Q. Do you remember seeing him crying at times when he would have no apparent reason——

Mr. FAY. Objected to as being not within the knowledge of the witness, merely a conclusion.

A. I have seen him cry but it was for something other than a nonapparent reason; it was during the trouble with his wife he did become affected in talking about how much he loved her and how little she returned it.

Q. And didn't he, you recall him being worried about his failure to make a living for his wife?

389 A. At times he did evince that worry.

Redirect examination by Mr. FAY:

Q. Was Mr. Witbeck compensated for his expert testimony in the Sabine Lumber Company case?

A. Yes.

Q. Was the reversal of that case by the Circuit Court of Appeal because of Mr. Witbeck's testimony?

A. No, it had nothing to do with the merits of the case at all; the opinion and decision of the Court of Appeal reversed the trial judge on what we call exception of no cause of action.

Q. Do you recall the length of time, approximately, that Mr. Witbeck was on the stand and testified as an expert for the Sabine Lumber Company?

A. I would say several hours maybe as much as five or six, I forget, the record will show.

Q. Did you know that Mr. Witbeck received retired officers' pay of one hundred and fifty dollars per month from 1928 to 1933?

A. I didn't know it definitely, but I think he was receiving pay in some amount, that he lived on it largely.

Q. Did you consider that Mr. Witbeck had an unusual memory as well as an unusual mind?

A. As stated——

390 Mr. MILLER. Objected to as grossly leading.

A. As already stated he did have a remarkable memory——

Mr. MILLER. I make the same objection to each question on redirect examination, and further object to all questions on re-direct examination for the reason they are not based on evidence adduced on cross-examination.

Recross examination by Mr. MILLER:

Q. Is it not true, Mr. Browne, that many people who are insane have remarkable memories, within your own personal knowledge?

A. I have seen people considered insane with very unusual memories.

391 Q. You considered him so yourself?

A. I thought he was unusual and in some ways abnormal.

Redirect examination by Mr. FAY:

Q. Mr. Miller on re-cross examination asked if you knew of other people who were mentally unbalanced, I want to ask you if you also know people in your own state, Mr. Browne, whom you consider a little mentally unbalanced but still who were quite successful in the occupation or profession they follow?

Mr. MILLER. Objected to as immaterial and incompetent——

A. In business and politics.

Q. Particularly politics?

A. Particularly in politics.

Mr. F. E. LACAZE, a witness on behalf of the defendant, called and being first duly sworn by the notary to tell the truth, the whole truth, and nothing but the truth, testified:

Direct examination by Mr. FAY:

Q. State your name.

392 A. F. E. Lacaze.

Q. And your occupation Mr. Lacaze?

A. District Manager United Pipe Line Company.

Q. How long have you been so employed?

A. As district manager nine (9) years.

Q. What was your employment prior to that time?

A. Superintendent of the gas department from 1921 to about 1929.

Q. Was the firm at that time known under the same name?

A. No.

Q. What was the name at that time?

A. The Palmer Corporation of Louisiana.

Q. Also known as the Potter Palmer Company at any time?

A. I don't think it has ever been named Potter Palmer, the Palmer interests owned it but I don't think they had the Potter Palmer name to it.

Q. Was it also known as the Atlas Oil Company?

A. Yes.

Q. And Louisiana Gas & Fuel Company?

A. Yes; Louisiana Gas & Fuel Company—

Q. And the United Gas Company?

A. After 1930, or latter part of '29.

Q. While employed as superintendent of the Palmer Company in 1921 did you have occasion to meet one A. T. Witbeck?

A. Yes.

393 Q. Under what circumstances?

A. He was employed in the engineering department at that time.

Q. Do you know how long he was so employed?

A. He came to work with the Palmer Corporation in 1915, and he enlisted in the Army I believe in 1917 and then he came back either the latter part of 1918 or first part of 1919. I was in the Army myself at that time. I was not working at the time he came back to work. I came back to the company in June 1919, Mr. Witbeck was working at that time with the company.

Q. Do you know how long thereafter he remained in the employ of the Palmer Company?

A. I think the latter part of '22 he was out—

Q. Do you know the circumstances under which he left?

A. I believe he was discharged. I don't know the reason, he was not working directly under me, I am not familiar with the exact reason.

Q. Then did you have occasion to come in contact with Mr. Witbeck thereafter until his death in December 1933?

A. Yes; I met him occasionally on the streets, or he might call in the office to ask about something.

Q. Do you know of your own knowledge that he was employed at any time in 1930-31-32 and '33?

A. I do not know whether he was employed at that time.

394 Q. What was your impression as to the type of personality Mr. Witbeck had, or the type of Mr. Witbeck's personality?

A. He was a repulsive sort of fellow, kinder brusque and a fellow that you didn't like at first meeting.

Q. Was he also a domineering, self-centered individual?

A. I would say he was.

Q. Did you have occasions to obtain personal knowledge as to the mentality of Mr. Witbeck?

A. He had a very brilliant mind, I will say that, and he had a remarkable memory, anything that he had done for a year before he could remember, he had a marvelous mind and memory.

Q. Did you in your connection with Mr. Witbeck consider him to be a highly eccentric individual?

A. He was very eccentric.

Q. Did you consider Mr. Witbeck to be a suspicious individual?

A. Yes; he always interfered with things that didn't concern him, he butted in, I would say in other people's work and he was not liked at all.

Q. Do you know of any projects on which he worked from the time he left the Palmer Company until the date of his death?

A. No, not to my direct knowledge; I know that Mr. Witbeck in talking to me told me——

Mr. MILLER. I object to anything this witness knows by having talked to Mr. Witbeck——

395 A. Mr. Witbeck told me, gave me the idea that he was doing a lot of work on Red River history, the great raft that was formed. I know one day he talked to me very much at length in regard to the history of Red River.

Q. Did you know that he wrote a biography on some explorers of Red River?

A. No.

Q. Did you know that Mr. Witbeck testified as an expert witness as a civil engineer in the Federal District Court in March 1933?

Mr. MILLER. I object to the question as leading——

A. I do not.

Q. During the time that you knew Mr. Witbeck and up until his death did you at any time consider Mr. Witbeck insane?

Mr. MILLER. I object to the question as irrelevant, immaterial, incompetent and invades the province of the jury.

A. I did not consider him insane.

(Witness tendered.)

Cross-examination by Mr. MILLER:

Q. But he did do a lot of things that the average normal man didn't do, didn't he Mr. Lacaze?

A. He was very eccentric.

396 Q. What things do you remember now that he would do out of the ordinary Mr. Lacaze?

A. Well he thought he was a superdetective and always snooping around to see if he could get any information on the employees and report to the higher-ups; one thing I know is he was the type man that could sit opposite the desk from you and if you had a letter turned like that [indicating] he could read that letter upside down and would know every word in it when he got through with it.

Q. And he had a tendency to pry into other people's business too, to some extent?

A. I have noticed in the organization, yes; I could not say as to the outside.

Q. He was not, the last few years of his life, the type man who would be a satisfactory employee in any organization, was he?

Mr. FAY. I object to the question.

A. Knowing him as I did I would not want him around me.

Mr. R. O. Roy, a witness on behalf of the defendant, being by the notary first duly sworn to tell the truth, the whole truth and nothing but the truth, testified:

397 Direct examination by Mr. FAY:

Q. Will you state your name?

A. R. O. Roy.

Q. And your occupation?

A. I am in the land lease and royalty business.

Q. And your office location—

A. 303 Commercial Bank Building—

Q. City of Shreveport, Louisiana?

A. Yes.

Q. How long have you been located in that business in Shreveport Mr. Roy?

A. Since about 1915, I believe, 1915 or '16.

Q. Now during the course of business did you have occasion to meet one Albert Tyler Witbeck?

A. I met Mr. A. T.—Albert T. Witbeck, I don't know the middle name.

Q. Approximately when did you first have occasion to meet Mr. Witbeck?

A. Sometime after the end of the World War, I don't know.

Q. Well just to try and locate it a little more definitely would you say within four years after 1919—

A. I would think it would be around 1919, somewhere between 1920 and 1923, I think.

Q. Thereafter during the rest of the period of 1920's did you have occasion to have work performed by Mr. Witbeck?

A. Yes.

398 Q. How numerous, to the best of your knowledge now would you say that you had occasion to call on him for work?

A. Witbeck served me as civil engineer and surveyor and whenever Mr. W. E. Martin was otherwise occupied I used Mr. Witbeck when he was available or some other surveyor.

Q. For the purpose of the record, Mr. Roy, could you state approximately how many jobs he did perform for you?

A. No; it might have been three or four times some years and once or twice in other years, and maybe not at all—

Q. I see—would you say that you did use him on ten different occasions over the period from the time you knew him until you stopped using his services?

Mr. MILLER. I object to the question as leading.

A. I don't know; perhaps I should say it could have been more, or it could have been less; I cannot remember.

Q. Do you recall being called as a witness in a divorce proceeding instituted by Mrs. Witbeck against Mr. Witbeck in December 1928?

A. Yes.

Q. Did you testify in those proceedings as a witness?

A. Yes.

Q. Do you recall at this time what the question was upon which you were called to testify?

399 Mr. MILLER. Objected to as irrelevant, immaterial, and incompetent.

A. I think I was asked either in one straight question or two or three connected up whether I thought Witbeck was unbalanced mentally or not.

Q. And if you recall what was your testimony at that time?

Mr. MILLER. I object to the question as irrelevant, immaterial, and incompetent.

A. I stated I didn't see anything the matter with Mr. Witbeck.

Q. Around that same period of years, 1928 and '29, Mr. Roy, did you have occasion to employ Mr. Witbeck for any reason whatsoever?

A. 1928 and 1929?

Q. Yes?

A. Well I cannot tell the exact dates but I feel reasonably certain that Witbeck did work for me in those years.

Q. Did you ever employ Mr. Witbeck around that time in the capacity of an investigator or detective?

Mr. MILLER. I object to the question as leading.

Q. I will reframe my question and ask, Mr. Roy, if you ever employed Mr. Witbeck other than as a surveyor around 1928 and 1929?

A. Yes.

Q. What was that capacity in which you employed him?

400 A. I employed him as an investigator or detective.

Q. What were the circumstances under which you found it necessary to employ Mr. Witbeck as an investigator?

A. In an envelope postmarked October 2, 1928, I received a letter demanding that I place certain money at a certain address in Shreveport on pain of death to my daughter.

Q. Was that the cause or reason then that you employed Mr. Witbeck as investigator to determine from whom you had received that letter?

Mr. MILLER. I object to the question as leading.

Q. I will change the question and ask was that the reason you employed Mr. Witbeck then Mr. Roy?

A. I felt I wanted somebody over and above the regular authorities to investigate such people as I could imagine might have sent the letter and because of Mr. Witbeck's disposition to try to learn all of the details of every person he met I thought he might make a good investigator that might notice little things that the ordinary man would not see, consequently I put him to work.

Q. In view of this employment that you gave Mr. Witbeck at that time did you thereafter have occasion to observe him at frequent intervals?

Mr. MILLER. I object to the question as leading.

401 A. After the termination of that employment I did not see Witbeck any oftener than previously, and I cannot remember that I had him do any engineering work for me.

Q. Did you have occasion to see him over that period 1928 and 1929, up until his death in December 1933?

A. I saw Witbeck occasionally.

Q. Would you talk to him on those occasions Mr. Roy?

A. Yes; not for any great length of time but we would meet on the streets and we exchanged greetings, and frequently he would start the conversation; Witbeck had a habit of telling his associates in business things he thought might interest them and I was one of the ones that he would report to.

Q. And did those circumstances or conditions we might say exist up until a short while before his death——

Mr. MILLER. Objected to as leading——

Q. And did those circumstances under which you saw him and talked to him continue up to the date of his death?

A. I have no way of knowing when I did see Witbeck last, and I cannot remember how long it was before his death, I know I was surprised when I read of his death, I didn't even know he was sick.

Q. Would you say that you had seen him within a year prior to his death?

A. Yes——

402 Mr. MILLER. Objected to as leading.

Q. During the period of your association with him both in a business manner and as an acquaintance did you ever form an opinion as a layman as to his sanity?

A. I never had any occasion to form any opinion about it——

Mr. MILLER. Objected to as leading——

A. To me he was like almost all other men except he would nose in, rather an unlikeable fellow.

Mr. MILLER. I move to strike that portion of the witness' testimony starting with the words "To me he was like almost all other men" and so forth to the end of his testimony for the reason it is not responsive to the question and is a voluntary statement on part of the witness, irrelevant, incompetent, and immaterial.

Q. Those were the main peculiarities that you noted Mr. Roy?

A. Those were the only peculiarities I noticed about him——

Mr. MILLER. Objected to as leading.

Q. And they were what?

A. He was rather a "nosey" man, inquiring into, prying into things that didn't always concern him, and without being able to say just how, he was always unattractive to me.

Q. Now at this time Mr. Roy what is your opinion as to the sanity of Mr. Witbeck during the time that you had occasions to speak to him or carry on conversations with him——

403 Mr. MILLER. I object to the form of the question——

A. I never saw anything in Witbeck that indicated insanity.

Q. Did you know that Mr. Witbeck testified as an expert witness as a civil engineer in the Federal Court here in March 1933?

A. No; I didn't know that, but I know that from time to time he took part in lawsuits, that may have been one of them.

Mr. MILLER. I move to strike that portion of the witness' answer beginning with the word "But I know that from time to time he took part in lawsuits" and so forth to the end of the answer for the reason it is not responsive to the question.

Q. Do you know that he did take part in litigations Mr. Roy?

A. Yes; I know that from time to time Witbeck testified in lawsuits.

Q. Just one more question—do you know of Mr. Witbeck's interest in research work pertaining to exploring and Indian lore?

A. I know that Witbeck was quite interested in ancient books, ancient history, ancient settlements and other original things connected with this country and perhaps other countries.

Q. Did Mr. Witbeck at any time give you any books or manuscripts?

A. Well I cannot think of any but Witbeck was in my
404 office two or three times, holding in his hands something he stated was a priceless original manuscript, but not being interested in those things I didn't look at it.

Q. What is your opinion as to Mr. Witbeck's capability as a civil engineer?

A. He was a good engineer.

Mr. MILLER. I object to the question for reasons to be assigned at the trial of the case, and to the form of the question.

Q. Were you always satisfied with the work that Mr. Witbeck—

Mr. MILLER. Objected to as leading.

Q. Were you always satisfied with the work that Mr. Witbeck performed for you?

Mr. MILLER. Objected to as leading.

A. Well, all engineering work.

(Witness tendered.)

Cross-examination by Mr. MILLER:

Q. Were you always satisfied with any other work he did for you?

A. As investigator, talking about the letter; I was not.

Q. Why?

A. Mr. Witbeck violated his instructions almost immediately after he walked out the office; I told him not to contact the sheriff. I told him not to contact the United States District
405 Attorney. I told him not to contact the police department that I had already gone over the matter with them and wanted him as a secret investigator over and above them; Wit-

beck told me that he had been in the Intelligence Department in the War, therefore I felt that my employment was very good, but immediately he went out and violated all rules and I felt that Witbeck was trying to keep me from finding out about it.

Q. Then you discontinued his services in that respect?

A. No. No; I kept him on for some, perhaps two months.

Q. Did he accomplish any results for you under that employment?

A. Well I don't think—yes; he accomplished some results.

Q. What were they?

A. He made me think he was the man that wrote the letter.

Q. You have no personal knowledge as to Mr. Witbeck's income for 1931 have you?

A. No; I have no personal knowledge of his total income in any year.

Q. Do you have any knowledge, could you name any individual work that he did in 1931, any job, anything like that?

A. No.

Q. From 1931 on, your meeting him was more or less on the street, you would run across him, and socially; is that correct?

406 A. I didn't meet him socially at all because I never went anywhere where he did, but the last job I can remember that Witbeck did for me was a survey near Elm Grove on some River land, but he may have performed other work.

Q. You knew his wife was working at the time he was working for you?

A. I don't think so; I don't believe I ever met his wife. I never discussed any of his personal affairs with him. Witbeck like a lot of other men I knew would come in sometimes and be in need of a job and he would ask me to hunt him something to do and I would send him out to take some leases or get me some land descriptions, and I could tell Witbeck was hard up, but I don't think he ever specifically mentioned his financial affairs to me.

It is stipulated by and between counsel for plaintiff and defendant that the signature of the witness is waived.

407 Deposition of John E. Heard, taken pursuant to notice annexed hereto and stipulation between counsel as therein contained, at Room 412 Federal Building, Shreveport, Louisiana, on the 21st day of March A. D. 1939, at 2:30 P. M. before Mrs. C. B. Fleming, Notary Public, after the said witness was sworn to tell the truth, the whole truth, and nothing but the truth, as follows:

Direct examination by Mr. LAFARGUE:

Q. You are Mr. John E. Heard?

A. Yes.

Q. With whom are you connected, Mr. Heard?

A. Standard Oil Company.

Q. Here in Shreveport?

A. Yes.

Q. In what capacity?

A. Civil engineer.

Q. How long have you been connected with the Standard Oil Company?

A. About twenty-two (22) years.

Q. Do you, or did you know Mr. Albert T. Witbeck?

A. Yes.

Q. When were you first acquainted with Mr. Witbeck?

A. It was in 1917 when I first met him.

Q. Just state the occasion when you first met him?

408 A. I was working then for the Louisiana Railway & Navigation Company on Federal Valuation of railroads and Mr. Witbeck was the office engineer. I was working for the railroad company.

Q. In what capacity?

A. In getting up this information for the Interstate Commerce Commission, I was pilot engineer for the railroad company.

Q. What railroad was that?

A. Louisiana Railway & Navigation Company.

Q. Now where was that at the time?

A. It was in Shreveport.

Q. And where was Mr. Witbeck's office?

A. Here in Shreveport.

Q. Did you have occasion to become closely associated with him during that time?

A. No.

Q. How often did you have any contact with him in either a business or social way?

A. Only in getting maps, some information from the field books, note books.

Q. Now during that time how long were you associated with him in that work here in Shreveport?

A. I cannot state exactly, he went to the Army you see during that time.

409 Q. Did you see him after his return from the Army?

A. Yes.

Q. Where?

A. In Shreveport.

Q. About what year?

A. Well he came back here right after the War.

Q. Was he reemployed in some capacity with the railroad at that time?

A. No; the job was completed.

Q. Do you know what kind of work he engaged in after his return from the War?

A. Land surveying mostly.

Q. As an individual or for some company?

A. As an individual.

Q. Was he a civil engineer?

A. Yes.

Q. How often did you see him after the War while he was engaged in his enterprise of civil engineer?

A. He came to the office pretty often to get government field notes.

Q. What office was that?

A. Standard Oil Company.

Q. You were then connected with the Standard Oil Company?

A. Yes.

Q. What year did you join up with the Standard Oil Company?

410 A. Well I said a while ago I had been with them twenty-two years, I had broken service, I went back to them April 1, 1919.

Q. Now how long did he come to the office after his return from the Army to secure maps from your company while engaged in civil-engineering work?

A. I imagine two or three times a year.

Q. Do you know of your own knowledge whether he associated himself with any other concern or company after his return from the Army?

A. No, I don't; he worked out of Mr. J. Y. Snyder's office.

Q. What?

A. He was a geologist—

Q. Mr. Snyder?

A. Yes.

Q. Now did you continue to see Mr. Witbeck after his return from the Army up until the time he died?

A. Yes.

Q. Where did Mr. Witbeck reside after his return from the Army—I don't mean particularly the street, but was it here in Shreveport?

A. Here in Shreveport.

Q. As far as you know did Mr. Witbeck pursue the occupation of civil engineer after his return from the Army to the time of his death?

411 A. Well he was in some kind of research work in addition to it; I don't know just how much time he devoted to each one.

Q. What type of research work?

A. He was always looking into historical data, things like that, looking for the old Spanish Capitol of Louisiana, he searched around until he located it.

Q. Was he married?

A. Yes.

Q. Did you know his wife?

A. No.

Q. Do you know whether or not he had any children?

A. One boy.

Q. Do you recall when the boy was born?

A. No.

Q. Could you say whether it was before or after the War?

A. That has been nineteen years, just about the beginning of the War, I don't know just when.

Q. Now did you notice any change in his condition from the time he went in the service until you saw him upon his return from service?

A. No.

Q. What would you say as to his apparent health, or did his health look good or bad to you?

A. He seemed to be all right.

412 Q. Just state briefly what type of person he was?

A. Well he was a man with an abnormal memory—he could go off and read a letter and come back and quote it to you, he remembered all kinds of small details about the drilling of oil wells, things like that, possibly I would not even think about and he was very bad tempered, hot tempered I guess you would call him.

Q. Did you consider him as being of sound mind after his return from service?

A. Well I considered him a little bit eccentric, but I could not see any difference in him before he left and when he came back.

Q. About what size man was he?

A. Five, seven, or eight, he was a little bit stocky built.

Q. Was he stocky built before he went in the service?

A. Yes.

Q. Now, did you testify with Witbeck in the case of Broderick et al. vs. Sabine Lumber Company in the Federal Court in March 1933?

A. I don't recall the date but I testified in that case.

Q. Were you present when he testified?

A. Not through all of his testimony.

Q. Did you hear part of his testimony?

A. Yes.

Q. What feature of the case did you give testimony on,
413 in other words what did you testify about?

A. The main thing was the location of a well drilled by Broderick & Calvert on land that was leased to them by the Sabine Lumber Company, and when I checked this location I found it was apparently not on that property.

Q. Well, was your testimony as to the location of the well as a civil engineer?

A. Yes.

Q. Do you recall what Mr. Witbeck had to testify about in the case?

A. He testified about the subdivision of the section into four quarters as well as the location of this well, he checked the location for Broderick & Calvert.

Q. He checked the location for Broderick & Calvert?

A. After the Standard Oil Company stopped payment on the oil you see.

Q. Now was Broderick & Calvert suing your company or were you a witness for the defense or plaintiff?

A. I was a witness for Broderick & Calvert.

Q. Who was Witbeck a witness for?

A. He was a witness for Broderick & Calvert.

Q. Now was Witbeck's testimony in the case mentioned, satisfactory and in accord with good engineering principles?

A. So far as I heard it was.

414 Q. The portion of his testimony that you heard, he gave satisfactory testimony and it was in accord with good engineering principles?

A. Yes.

.Mr. SMITH. That question is objected to as being leading and I ask that it be stricken.

Q. I will ask you this way—what would you say as to the testimony that Witbeck gave insofar as the portion that you heard him testify in the mentioned case?

A. I believe he followed the instructions laid down in the Manual from the Land Department at Washington.

Q. Was that a manual that was followed by civil engineers and being used?

A. Yes; here is a copy right here [presenting book] he had one of these in Court. Judge Dawkins took it and looked it over.

Q. Just state the title of the Manual that you hand me here so as to give an identification of same?

A. It is a Manual of Instructions for the survey of Public Lands of the United States.

Q. Is that Manual still used by civil engineers?

A. Yes.

Q. What kind of reputation did Mr. Witbeck have with the members of the civil engineering fraternity here in
415 Shreveport?

A. I don't know; some of them disliked him.

Q. I mean as to his ability as a civil engineer?

A. I could not tell you.

431 In The United States District Court For The Western
District of Louisiana, Shreveport Division

At Law Number 2053

A. J. BRODERICK AND GEORGE CALVERT

vs.

SABINE LUMBER COMPANY

* * * * *

Evidence of Albert T. Witbeck adduced on the trial of the above numbered and entitled cause at Shreveport, Louisiana, beginning June 16th, 1932, before the Honorable Ben C. Dawkins, Judge of the United States District Court, Western District of Louisiana, and a jury of twelve men, good and true, duly impanelled to try said case.

Appearances: Thatcher, Browne, Porteous & Myers, Counsel on behalf of plaintiffs. Lee & Gilmer, Counsel on behalf of defendant. Mrs. John Marshall, Shorthand Reporter, U. S. District Court, Western District of Louisiana.

* * * * *

ALBERT T. WITBECK called to the stand by counsel as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. MYERS.

This witness is called for the sole purpose of identifying this particular plat at this time. I will recall him later as to other phases of the case.

Q. Mr. Witbeck what is your full name, please?

432 A. Albert T. Witbeck.

Q. Where do you reside?

A. Shreveport.

Q. What is your occupation?

A. Civil engineer.

Q. What is your experience in that capacity?

A. About thirty-five or thirty-six years.

Q. I hand you what purports to be a plat signed A. T. Witbeck, dated May 20th, 1932, and ask you if you can identify that?

[Handing document to witness.]

A. I can; yes sir.

Q. What is it?

A. That is the location of the well drilled by Broderick & Calvert on what was said to be the Sabine Lumber Company's land, connecting with the east line of what was known as the Mobley tract and what was said to be the east line of the Broderick & Calvert lease, with the existing buildings upon there as they were at the time of the survey, and the location of other buildings which were pointed out to me on the ground at the time, and which evidence on the ground showed to have been there.

Q. What area is depicted by the plat between the marked lines?

A. Approximately one hundred fifty-five feet (155') wide.

Q. By whom were the locations of the buildings that were not then existant pointed out to you?

433 A. By Lee Barr.

Q. Was there any other evidence from which you made this plat?

A. In some places there was. The location of the old road shows there. In some places it shows evidence of what buildings have been there. What the buildings were, other than what Lee Barr told me, I do not know.

Q. For the convenience of the jury will you indicate upon the plat the east line of the Mobley tract?

A. Right along here.

By Mr. MYERS:

I ask that the plat be identified as P-49.

(Document properly identified.)

Q. I will ask that you mark with pencil for the purpose of identification the line that you have just indicated to the jury.

A. I mark the east line of the Mobley tract A. The corner that is eight (8) chains west of the Southeast (S. E.) corner of the southwest (S. W.) of the northeast (N. E.) quarter I will mark with a B. The well is shown right here. Here is the derrick shown around here. Here is the standard rig, as shown there. The water tank is back here. Here is the negro church down here on the south side, south end of the map. The house that was pointed out as Lee Barr's house is up here in the Northeast (N. E.) corner of the map. Right here runs evidence of an old fence line part of the way. Barr pointed out the balance as to how it ran down

434 here but up here it shows upon the ground. There is wire scattered around. This old road here can be identified upon the ground. It is not used any more. The road over here is used. These dotted lines or squares or rectangles are the ones that were pointed out to me by Lee Barr. There are two locust trees here which I have marked. Right adjoining those locust trees he said he had a house. Sixteen feet away from that house to the north was a building in which his office was, ten feet square, and that adjoined and was connected on to a restaurant. Above that was what he called a pool hall. Then across the fence, on the other side, was another house, and then above that still further was another house. All of those dotted ones have been removed but there is some evidence on the ground in some places where you could see there had been houses. There had been buildings there or structures of some kind.

Offering by Mr. MYERS:

I offer in evidence the plat identified as P-49.

(Whereupon the offering was received by the clerk and filed in evidence as P-49.)

Mr. LEE. I desire to cross-examine.

Mr. MYERS. I am going to recall him.

Mr. LEE. I would rather cross him now, if Your Honor please.

The COURT. All right.

Cross-examination by Mr. LEE:

Q. When were you in Zwolle, Mr. Witbeck?

A. Several times, Mr. Lee. Which particular time?

435 Q. In connection with making this map?

A. The date is given there. I think it was along in March, wasn't it?

Q. The map shows May 30th, 1932.

A. The survey was made the latter part of March, about the 22nd or 23rd of March.

Q. Then when your map recites that it is a survey in the vicinity of the well of Section Thirty-One (31), showing all existing structures and the structures removed, and it bears the date May 30th, 1932, it is an error?

A. No, the map was made that time.

Q. You mean you made your map May 30th, 1932, and you made your survey in March?

A. I was down there several times. Mr. Lee, I was down there probably five or six different times during March, April and May.

Q. Surveying these lands?

A. Different things down there in connection with the suit.

Q. Well, I am asking you when you made the survey that this map is supposed to reflect?

A. Part of it I am certain was made along about the 22nd or 23rd of March, and there was some of it made along in April. Now just what time in April I cannot remember offhand.

Q. Where are the field notes from which you made your survey?

A. I had copies of the deeds.

436 Q. Is that all you had?

A. And the leases.

Q. And is that all you had, the copies of the deeds and the leases?

A. I had a copy of the government field notes.

Q. Where did you get those?

A. Baton Rouge, got them myself.

Q. Where is the copy of those field notes as of this date.

A. You mean of that date? There is not any of that date.

Q. Where are the field notes from which you made this survey at this time?

A. Part of them, as I say, was taken from information gathered from government field notes. Part of them from certified copies of the deeds and the leases.

Q. My question is where are the field notes that you used when you made this survey?

A. I have them.

Q. Will you produce them?

A. I haven't them here.

Q. Where are they?

A. At home.

Q. Will you produce them during the progress of this trial?

A. Certainly, certainly. Be glad to get you a copy of them.

Q. Will you bring them here in the morning?

A. Uh huh.

437 Q. Can you get them this afternoon?

A. I expect I could by going to the house and getting them.

Q. Would you object, after you get off of the stand, to going and getting those field notes and producing them here?

A. Of course not.

Q. You will do that?

A. Certainly, if you wish it.

Q. What do those field notes cover?

A. It depends upon what field notes you want.

Q. I want the field notes that you used when you made this survey.

A. I can give you field notes of the Mobley tract. I can give you field notes—that is, descriptions of the Mobley tract and of what is called the Bolin tract and the southeast end of the Broderick & Calvert lease. Now what more do you want?

Q. All of that was in government field notes?

A. No, there are no government field notes in the interior of the section.

Q. What government field notes did you use?

A. I used government field notes of the outside of the section, made by John J. Boyle in August, 1875.

Q. Do you have those notes in your possession?

A. I have a copy of them.

Q. What is that?

A. I have a copy of them.

438 Q. Do you have them at your home?

A. I have a photostatic copy of those field notes right here.

Q. You have a photostatic copy of those field notes right here?

A. Yes, certified by the Registrar of the Land Office.

Q. Certified to by the Registrar of the Land Office?

A. Yes.

Q. Do you have them here?

A. The outside of the section I think are here.

Q. All right, produce them.

A. My attorney has them. I fail to see, Mr. Lee, what bearing the field notes of the outside of the section have upon a small piece inside of the section.

Q. I am not asking for your opinion about that.

A. I know it.

Mr. BROWNE: The witness is a civil engineer and has the right to express an opinion upon that, perhaps is better qualified than counsel. He knows more about it than I do.

The COURT. The parties interested have the right to require production of the evidence used by the surveyor in order to see if he has followed the field notes right.

By Mr. LEE:

Q. Are these the field notes that you used in making that survey?

(Counsel examining document handed to him.)

A. This is a copy of the', yes.

439 Q. That is a copy of them?

A. Yes, sir.

Q. Who made the copy?

A. I do not know who made that copy. I made a copy myself from the original note books.

Q. Then you did not use those field notes?

A. I did not use those, no, but I checked them against the copy that I had.

Q. Where is the copy that you had, Mr. Witbeck?

A. I just told you a moment ago.

Q. At your home?

A. Uh huh.

Q. When did you make the copy from the field notes?

A. Along in February or March. The latter end of February or the first part of March.

Q. Did you go to Baton Rouge to make the copy?

A. I did.

Q. You went to Baton Rouge to make the copy?

A. I went to Baton Rouge and saw the original note books myself. I not only looked at the original note books but I went over other documents that were there that do not ordinarily get photostated when they send copies out.

Q. You did not have in your possession when you made this survey a certified copy of the government field notes either from the Washington Land Office or from the Baton Rouge Land office?

440

A. No, I didn't think that I needed them. I don't think so now.

Q. You do claim you had in your possession at that time certain notes that you made yourself?

A. Yes, sir.

Q. From the government notes?

A. Uh huh.

Q. You do not claim that you got those notes from the Land Office at Baton Rouge?

A. I did.

Q. Now what date were you in Baton Rouge upon the day that you got those notes?

A. Oh, I think it was along about the 20th of February, the 18th or 20th of February. Somewheres like that.

Q. Of the present year?

A. Yes.

Q. Who was in the land office in Baton Rouge at the time you got those notes?

A. Miss Lucy Mae Grace.

Q. Did she turn those notes over to you?

A. She did.

Q. At that time?

A. Yes.

Q. To be copied by you?

A. Yes, sir.

441 Q. In Baton Rouge?

A. Yes.

Q. In the city of Baton Rouge?

A. Yes; in the old capitol, before they moved.

Q. In the old capitol. What was that date?

A. I believe about the 20th of February. Let's see, that was a Friday and that is on the 19th of February. Identified exactly.

Q. Now, at that time, as I understand it, you made certain notes that you used in this survey?

A. Uh huh.

Q. At that time you made notes from which you made this survey?

A. I took the notes of the outside of the section.

Q. And you have those notes in your possession at your home?

A. Yes. As a matter of fact I have some of the original notes I think of that territory there. I have some of the original maps of that territory right here in my pocket of one of the U. S. surveyors.

Q. I believe you have said that you would produce here this evening the field notes you used or copies you made from field notes at the time you made this survey.

A. If you wish them.

Q. I wish them.

A. All right.

442 Q. Do you know Mr. Charles D. Evans, Commissioner of Streets in Shreveport?

A. I do.

Q. He is a civil engineer, is he not?

A. I think so; yes.

Q. Well, don't you know so?

A. Why, yes.

Q. Has an office in Shreveport?

A. He did have. I do not know whether he does now or not. I don't know whether he practice now while he is city commissioner.

Q. Did you have occasion to go to his office or the office that he maintained in the city of Shreveport and to represent that you had arranged to see certain maps that he had made of this survey?

A. I asked if they had the maps there.

Q. Did you not state at that time that you had made arrangements for an examination of those maps, that you had arranged for it.

A. That I had arranged for it?

Q. Yes?

A. No.

Q. Do you remember what time you went to his office?

A. I don't know; some time along in February.

Q. Do you know what young man was in the office when you went there?

A. How is that?

443 Q. Do you know what young man was in the office when you went there?

A. Why, there was some young fellow working there. I don't know who he was.

Q. Do you deny that you stated to him that you had made arrangements to look over the maps made by Mr. Evans of the survey?

A. I did not do any such thing there. I asked for Mr. Freeman and left a note there.

Mr. BROWNE. We object that a question like that is not proper—"do you deny." It assumes a condition of affairs not

shown to have existed. The witness has not denied anything. That is really not a proper way to cross-examine a witness and especially an expert.

(Question withdrawn.)

By Mr. LEE:

Q. Did you take up with Mr. Evans the matter of getting data out of his office on the occasion?

A. No; I did not; it was not necessary. He turned his office over to E. M. Freeman. I went to see Mr. Freeman and left a note for Mr. Freeman and told him what I had done.

Q. Did you see Mr. Freeman before you had access to those records?

A. I did not.

Q. Just took advantage and examined the records, took charge?

444 A. Sir?

Q. Just took charge and examined Mr. Evans' records?

A. They brought them out and handed them to me.

Q. Who brought them out?

A. The young man who was in the office, working there.

Q. What did you say to him, Mr. Witbeck, when you got him to bring those records out?

A. I asked him if they had any maps down there of that section of the country, the same as I would ask anybody else; I have asked other engineers what they had done. He brought out this map, went and dug it up out of a drawer. Dug the blueprint up out of a drawer.

The COURT. What is the object? What are you driving at?

Mr. LEE. I think I will be able to show, Your Honor—whether I can or cannot remains to be seen—but what I had in mind was this: We do know that this witness went to Mr. Evans' office, he admits that. At that time he was furnished a certain record belonging to Mr. Evans.

The COURT. He was what?

Mr. LEE. He was furnished with certain records belonging to Mr. Evans' survey of the particular tract of land he surveyed at that time. I have called upon this witness to produce the evidence he had at the time he made that survey. I have in mind making a comparison of the evidence he produces, since Your Honor asks me to reveal my hand, with the copies that
445 were there in the office.

The COURT. That is permissible. I got the impression that you were trying to show some ulterior motive on the part of the witness.

Mr. LEE. I want to show that he went there and asked to examine Mr. Evans' records without taking it up with Mr. Evans and without getting Mr. Evans' consent. He went there in his absence from the office. The other is to show if I can, any evidence that may discredit.

A. Here is some of the evidence that I had in advance.
(Exhibits map.)

The COURT. We are trying to find out the relevancy of this cross-examination. I do not think that is the proper method of testing the witness. He will produce whatever he has and then you have the right to compare that with anything else that you know about it as having more weight than what he may have had.

By Mr. LEE:

Q. Mr. Witbeck, you made a survey of the premises for the purpose of making this map. Where did you begin your survey?

A. Which one? This one?

Q. Yes.

A. At the point where I left off the one previous to that.

Q. Well when you made the previous survey where did you begin?

A. Began one time at the west quarter corner of the section, which is accepted by everybody in that country, so I understand and have been informed.

Q. Then you began at what corner?

A. The west quarter section corner of Section 31.

Q. At a point you say that had been accepted by everybody in that country?

A. That is what they say down there.

Q. You did not make any survey at that time for the purpose of establishing the correctness of that statement?

A. Sir?

Q. Did you make any survey at that time for the purpose of establishing its correctness?

A. Well, I checked that corner; yes, sir.

Q. Where did you check it from?

A. I ran from that corner east.

Q. How far?

A. Well altogether I ran a little better than a mile.

Q. All right, what did you find?

A. I found a saw shaft collar and an iron pin driven through the middle of it, purporting to be the center of the section. Half way between that and this corner that I said I measured from

there is an iron pin that checks within four-tenths of one foot ($4/10$ to $1'$) being true. That corner is the northeast (N. E.) corner of the original Town of Zwolle and it checks out with lot corners in the town, old iron pins that are set
447 there in the town. Checked all the way through. On the way with that, I called it one-half mile but it is a little more than a half mile, there was a sweetgum tree that was blazed on the north side with a surveyor's blaze, showing that I was apparently upon the right track, and I ran out to this saw shaft collar and pin in the middle of the section.

Then I ran a trial line north for the distance called for in the Mobley tract, ran due north as called for in the deed. It is twelve chains and seventy-seven links. I transposed that into feet and made it Eight Hundred Forty-Two Feet ($842'$), I think, and a fraction—some one-hundredths feet. Within a foot of where that distance came out there was a three-quarter inch iron pipe, which I took to be the northwest (N. W.) corner of the Mobley tract. I ran east from there the distance called for in the description of the Mobley tract, eleven chains and thirty-four links, which was Seven Hundred Forty-Eight and Forty-Four One Hundredths Feet ($748\frac{44}{100}'$). I found nothing there at the Northeast (N. E.) corner. I ran south the distance called for and set a temporary stake. Then I ran east from this saw shaft collar, checking the distance to where I had come south from the Mobley tract, continued on east and tied in with a 1×2 stake which was reported to have been set by A. S. Gibson, a civil engineer down there, as being twenty-one feet ($21'$) north
448 of the corner in the road. I made it twenty and eight-tenths feet ($20\frac{8}{10}'$) I checked on east and I ran into three stakes, or what I assumed, for the purpose of examination, to be the east line of the section.

Taking the government field notes then on the east side of the section I found no evidence of any bearing trees called for in the government notes. I did find what seemed to be a line tree marked upon the north and south, that had been cut through the blazes. The blaze appeared to be around fifty years old, which would check very closely with the government notes as called for marking the line tree on the north. Now that tree checked out in distance of about one chain of what it should be, according to the government notes.

Then I went south and it called for two chains and fifty links, approximately—two chains and forty-nine links exactly. I called it two chains and one-half or one hundred sixty-five feet

(165') to the bank of Bayou Scie. It says, "Run northwest and very soon turn west." At one hundred sixty-five feet (165') I was at the bank of Bayou Scie. Ten chains further down it called for—arriving at Bayou Scie it runs east. That is Six Hundred Sixty Feet (660') from the corner. I made it Six Hundred Seventy-Five Feet (675'), or fifteen feet (15') more, about as near as I could get to the bank. Then it called for, "Reaching Bayou Scie again we cross west of Southwest at twelve chains and fifty-five links from the corner, "which is Eight Hundred
Twenty-Seven Feet (827'). I made it Eight Hundred
449 Forty-Six Feet (846') or nineteen feet (19') more. The bank was very hard to determine but I checked it very closely.

Now thirty-nine feet (39') a little north of west of me there was a two-inch iron pipe, which seemed to have been recently set there. I tried the same experiment with this iron pipe. There was no evidence of any line tree to the north of that. Running to the south Bayou Scie would not check in any one of the instances as called for by the government notes from the corner, so I disregarded that entirely and for the purpose of this survey I accepted the three stakes that were there.

This corner that was said to have been set by Mr. A. S. Gibson, from which most of the locations seem to have been run out in that immediate territory, checked almost exactly half of the way between these three stakes to the east and this saw-shaft collar to the west. Using information that I received from the Standard Oil Company prior to going down there, and here are the notes and the information, they made the distance from the east shaft collar to this point twenty-one feet (21') south of the stake said to have been set by Gibson, making the distance at fourteen hundred thirty-one feet (1431'). I made it at fourteen hundred thirty and nine-tenths feet ($1430\frac{9}{10}'$), which for all practical purposes is the same. From that corner I have established the east
line of the Mobley tract as seven hundred forty-eight and
450 forty-four one-hundredths feet ($748\frac{44}{100}'$) or eleven chains and forty-four links, as called for in the deed from Leone to Mrs. Mobley.

Q. You began on the quarter corner of the west line of the section?

A. Yes.

Q. You did not establish that corner—

A. (Interposing counsel.) I checked that corner that called for a stump southeast or across the distance southeast, I don't

remember. There is a stump that checked out very closely with that corner.

Q. Other than that check did you make any other check of that corner?

A. I did not. The town of Zwolle was laid out by that corner and the town of Zwolle was laid out twenty-one years after the government survey. There was evidence of the government survey at the time the town was laid out. There is a line to the north and there is evidence of this line down to the south.

Q. I understand that in locating the center of the section Thirty-one (31) you accepted the location as pointed out to you there?

A. No, sir; nobody pointed it out.

Q. Well, did you find evidence there?

A. I found evidence there; yes, sir.

Q. What did you find there?

A. I found this saw-shaft collar and I found a rail that
451 had been set there right recently, in addition to several other corners which had apparently been set within the last few years. However, inasmuch as I was following the deed, which was made somewhere prior to the 15th of December, 1898, and it called for a description of twelve chains and seventy-seven links north and south, eleven chains and thirty-four links east and west, as now laid out, if staked, I did not pay any attention to how it should be staked at thirty-one years afterwards or thirty-three years afterwards.

Q. That deed commenced at the center of the section, did it not, as the starting point?

A. I said, "As now staked out." Now, marking this old saw-shaft collar, that is, a little east and south, was a thirty-inch sweetgum, which had been marked approximately thirty to forty years ago from the looks of the marks. Presumably some of the surveyors that marked it didn't see the old mark because they wouldn't have marked over it.

Q. Are you prepared to say at this time, or to testify, that this saw-shaft collar, to which you have referred as being at the center of the section, was used for staking out the Sallie Mobley tract?

A. I would not be the least bit surprised but what it was very close to the original corner.

Q. You do not mean to testify then——

A. (Interrupting counsel.) I don't know who set it there.

452 Q. You did not know whether it was used in staking out the Sallie Mobley tract——

A. (Interrupting counsel.) I can tell you——

The COURT. (Interrupting witness.) Let counsel get through with the question before you start.

By Mr. LEE:

Q. My question is this, you have no evidence to show that the saw-shaft collar that you found——

A. (Interrupting counsel.) Where is a hole in the saw-shaft collar.

The COURT. Remember what I told you, wait until counsel gets through with the question. The reporter cannot take you when you are both talking at the same time.

By Mr. LEE:

Q. You had no evidence to show that the saw-shaft collar that you found at a place that you assumed was the center of the section, was such a center. Nor did you have any evidence to show that that saw-shaft collar was used in staking out the Sallie Mobley tract when the deed was made in 1898?

A. The trees, Mr. Lee. It was the oldest corner in evidence there and was marked by this witness tree to the south with a cross pointing directly toward it. Then after running the approximate distance north, within less than one foot, there is a three-quarter
453 inch iron post driven in the ground up there, apparently for the northwest corner of the Mobley tract. That line checked with another corner that is down there.

Q. What kind of witness tree was this?

A. Sir?

Q. What kind of witness tree was this?

A. Sweet gum.

Q. You do not mean to testify that was a witness tree according to the government survey?

A. The government never ran anything inside of that section. They only ran the outside boundaries. It is the center of the section.

Q. When you testified that was a witness tree you meant to say that some surveyor in the past had made some mark upon that tree.

A. Yes, sir; some surveyor.

Q. Now, Mr. Witbeck, did you locate any of the government trees, witness trees, at any of the corners of Section Thirty-One?

A. No, sir.

Q. Did you try?

A. No, sir; except on the west quarter corner and I found this stump underneath this building but on the east quarter corner there were no trees.

Q. You did not attempt to establish the southwest corner of the section from the government survey, according to the government notes; nor did you attempt to establish the northwest corner according to the government notes; nor did you attempt to establish the northeast corner according to the government notes; nor did you attempt to establish the southeast corner according to the government notes?

A. No, sir.

Q. In fact, as I understand it, you were largely influenced in your survey by certain iron stakes, saw stakes, and other evidences of previous surveys made by local surveyors in the last fifteen or twenty years?

A. I cannot say. Mr. Lee, about the last fifteen or twenty years, but every survey that was made inside of that section must have been made by local surveyors because the government never ran any lines inside of the section. They only ran the outside lines of the sections.

Q. Now when you went back this time and made your survey of the five acres embraced in this lease, where did you begin that survey?

A. At the southeast corner of the Mobley tract.

Q. Southeast corner of the Mobley tract as you had established it according to your previous testimony?

A. Yes, sir.

Q. Then this map and the location of the buildings upon the map, the location of the well upon the map, the location of the church upon the map, and the location of all physical objects upon this map, are made with respect to a survey beginning at the southeast (S. E.) corner of the Mobley tract as you had located it, according to your testimony, in a previous survey?

A. No, sir; I made all of these locations that you speak of in a previous survey. I just checked them in this survey.

Q. My question, Mr. Witbeck, was when you made your survey of this map where did you begin?

A. I said, for this map, at the southeast corner of the Mobley tract.

Q. Now, my question is, all physical objects shown upon this map, as to the distance shown, as to the location, are made with reference to a survey beginning at a point supposed to be the Southeast (S. E.) corner of the Mobley tract, a point which you had previously established at that point?

A. It is all based, Mr. Lee, upon the survey which I showed you. I mean the saw-shaft collar and the line running east and

running around the Mobley tract, as I have testified. Everything is tied in in that survey. This is just a check. It is a survey from that southeast corner of the Mobley tract, and the buildings that were said to have been there and that are shown in dotted lines were put on relative to the other buildings that are there now, other structures.

Q. When you sought to establish the center of Section Thirty-one (31) and accepted the saw-shaft collar, the hole therein, as correctly representing the center of the section, did you not at that time find other stakes and other evidences of other surveys showing the location of the center of Section
456 Thirty-one (31) different from the saw-shaft collar?

A. Yes, sir; there were several of them there.

Q. That is all.

(Witness excused.)

457 STATE OF LOUISIANA.

Parish of Caddo.

I, Mrs. John Marshall, Notary Public in and for the Parish of Caddo, State of Louisiana, do hereby certify that the foregoing twenty-six (26) pages of typewritten matter constitute a true and correct copy of transcript of my stenographic notes taken of the testimony of Albert Tyler Witbeck on the 16th day of June, A. D., 1932, in suit #2053, A. J. Broderick and George Calvert versus Sabine Lumber Company, tried before the Honorable Ben C. Dawkins, Judge of the United States District Court, Western District of Louisiana.

Whereof I set my hand and seal on this the 23rd day of March, 1939.

[SEAL]

MRS. JOHN MARSHALL,
*Notary Public in and for the
Parish of Caddo, State of Louisiana.*

459

Agreement to take deposition

Plaintiff and defendant, by counsel, do hereby agree that the Plaintiff may take the testimony of Mrs. John Marshall, Court Reporter, Parish Court House, Shreveport, La., and Dr. W. S. Kerlin, Shreveport, La., by deposition, at such time as will be agreeable to the U. S. Attorney and Marion K. Smith, Attorney, Shreveport, La., on the — day of —, 193—, at — O'clock, — M., waiving all other and further notice and formality. The testimony so taken may be offered in evidence by either party, subject to any objection that might be interposed thereto, it being

agreed that such objections may be made upon the trial of the cause or at any time prior thereto; however, objections as to the form of question or answer must first be made at the time of the taking of the deposition in order to be available thereafter.

Change of date, hour, place, or office, and person before whom deposition is to be taken, may be made by agreement of counsel for both parties, who may appear to examine the witness. Such testimony may be taken by either one or both parties, on oral examination by counsel or upon written interrogatories filed prior to date of taking with the person to take the deposition.

Witness our hands this 23 day of March 1939:

WARREN E. MILLER,

Warren E. Miller,

Attorney for Plaintiff.

DAVID A. PINE,

David A. Pine,

United States Attorney,

Attorney for Defendant.

461

Appearances

Mr. Malcolm E. LaFargue, for the Defendant; Mr. Marion K. Smith, for the Plaintiff.

Mrs. JOHN MARSHALL, being first duly sworn by the notary to tell the truth, the whole truth, and nothing but the truth, testified:

Direct examination by Mr. LAFARGUE:

Q. You are Mrs. John Marshall?

A. Yes.

Q. Mrs. Marshall, did you take the evidence in the case of A. J. Broderick & George Calvert vs. Sabine Lumber Company At Law No. 2053 on the Docket of the United States District Court for the Western District of Louisiana, Shreveport Division?

A. Yes.

Q. When was it taken?

A. By refreshing my memory from my notes it was taken on the 16th day of June 1932.

Q. Were you the official reporter at that time?

A. No, R. T. Russ was official reporter under appointment by Judge Ben C. Dawkins. Mr. Russ at that time was an associate of mine in the reporting business, and I

462

frequently covered reporting in federal court as deputy reporter, on approval of Judge Dawkins.

Q. That was a case tried in the federal court here at Shreveport?

A. Yes.

Q. Did you take the notes in person?

A. I did.

Q. Did you transcribe the notes in person?

A. I did.

Q. The notes that you took, are they the same notes that you have certified to and mailed together with other depositions taken in this case to Washington?

A. Yes.

Q. Do your notes under the certificate show a full and complete transcript of the testimony as given by the witness, Albert Tyler Witbeck?

A. Yes.

Q. Mr. Witbeck was a witness for whom, in that case?

A. For the plaintiff.

Q. And the testimony as certified to by you represents testimony of Mr. Witbeck as a witness for plaintiff in such case?

A. Yes.

STIPULATION

463 In view of the fact that the testimony as certified to by Mrs. John Marshall, court reporter, having been mailed to Washington before this deposition was taken and it being impossible to introduce same in evidence at this time, it is stipulated that same may be presented for introduction at the proper time on trial of said case, and that this deposition will be conclusive as to the contents and identification of said transcript of evidence; it however being understood this is not consenting to the admissibility of the record, but only to the fact that the transcript of the testimony as mailed by the witness was in fact the transcript of testimony which was taken of Albert T. Witbeck.

Dr. W. S. KERLIN, a witness on behalf of the defendant, being first duly sworn by the notary to tell the truth, the whole truth, and nothing but the truth, testified:

Direct examination by Mr. LAFARGUE:

Q. You are Dr. W. S. Kerlin?

A. Yes.

464 Q. Doctor, you practice here in Shreveport?

A. Yes.

Q. Just state briefly your qualifications as a doctor, giving where you graduated, degrees, and what experience you have had since then.

A. I am a graduate of Tulane, 1913, served two years in Charity Hospital, New Orleans, three years in Naval Medical Service, and since then I have specialized in internal medicine in Shreveport.

Q. You are a duly licensed, practicing physician?

A. Yes.

Q. Just state briefly what you mean by specializing in internal medicine?

A. That is one specialty of medicine which comprises diagnosis principally; that is really what it means.

Q. At present you are connected with the Tri-State Sanitarium?

A. Yes.

Q. Also the Willis-Knighton Clinic, I believe?

A. Yes.

Q. Doctor, did you know one Albert T. Witbeck, the deceased veteran in this case?

A. Yes.

Q. When did you first become acquainted with him?

465 A. In 1920.

Q. Are you an ex-service man?

A. Yes.

Q. Have an honorable discharge?

A. Yes.

Q. Are you a member of the American Legion in Shreveport?

A. Yes.

Q. Do you know of your own personal knowledge whether Mr. Witbeck was a member of the American Legion in Shreveport?

A. He was.

Q. Was he connected with the same post you were here in Shreveport?

A. Yes.

Q. When did you first meet Mr. Witbeck?

A. In 1920.

Q. Where was that?

A. Legion meetings.

Q. Here in Shreveport?

A. In Shreveport.

Q. Was that how you happened to become acquainted with him through American Legion connection?

A. Yes.

Q. Did you know him and see him until his death about the latter part of November 1933?

A. I saw him quite often on the streets and at Legion meetings.

466 Q. Approximately how often during that period of time would you say you saw him?

A. Well, I moved out from downtown in 1923, from 1920 to 1923 I saw him practically every day; he used to stand there on the corner of the Merchant's Bank Building, and I always attended Legion meetings.

Q. Over what period?

A. 1920 to 1923, practically every day I saw him.

Q. How about from 1923 to 1933?

A. I would say on an average of once every two or three months, something like that; beg pardon, I attended Legion meetings pretty regularly up until about 1931 or '32, and he was usually there, since then I didn't attend so regularly.

Q. Now, did you have occasion to ever examine Mr. Witbeck?

A. I did.

Q. Just state when that was, if you recall, and what type examination you made of the veteran?

A. My records show it was October 4, 1933.

Q. What kind of examination did you make?

A. That was a physical examination for disability insurance, for either increasing it or reinstating, I forget which.

Q. That was government compensation?

A. Government compensation, insurance.

Q. I hand you for the purpose of identification only, government's exhibit marked Kerlin 1, Kerlin 2, and Kerlin 3, and I
467 hand you Kerlin 3, and ask if that is the report that you made as a result of your examination of Mr. Witbeck on October 4, 1933? [Presenting Exhibit to the witness.]

A. Correct.

Q. Please give us your findings as well as the history or complaint and the result of your examination; I will ask you to just testify to it, after refreshing your memory from Exhibit Kerlin 3?

A. He came to my office complaining of chronic bronchitis, resulting, as he thought, from gas poisoning, and substernal pain, that was the essence of his complaint.

Q. Now, what did you find, what were your findings on your examination?

A. My findings were essentially negative; from physical examination I found his lungs to be normal, both by auscultation and percussion, and his expansion was very good, about three or three and one-half inches.

Q. What was his blood pressure?

A. Normal 139 over 100.

Q. Were there any audible râles in his lungs?

A. No.

Q. What was the chest measurement on full inspiration?

A. On full inspiration 40 inches and on expiration 37½, two and one-half inches expansion is considered pretty good expansion. On account of his complaint of substernal pain
468 I naturally thought of some heart trouble and made an electrocardiographic tracing which revealed only minor changes.

Q. Was there any suggestive, or rather was there anything that conveyed in your opinion anything regarding suggestive history of anginal attacks, or what have you to say about that type history?

A. Well, in the absence of electrocardiographic findings, I didn't attach a whole lot of importance to it, and subsequent events proved that to be correct, he did not have any myocardial, any heart muscle damage.

Q. Now, did you make a general physical examination?

A. I did.

Q. Now, from your observation and knowledge of Mr. Witbeck how did he appear insofar as his physical or mental appearance was concerned?

A. Very good.

Q. Would you say he was normal or abnormal?

A. I would say he was normal, he was high-strung.

Q. Do you ever recall that he ever showed symptoms of any mental disorder?

A. No.

Q. During your association with him in the Legion meetings would Mr. Witbeck, or rather did Witbeck ever take part in the proceedings?

469 A. Quite often.

Q. At those times would he have anything to say, or just explain what type of activities he became involved in?

A. He was always rather aggressive and constructive in his criticisms and suggestions, very intelligent.

Q. Was he rational or irrational in what he talked about?

A. I considered him rational.

Q. That was your opinion as a doctor?

A. Yes; I thought he was rather decided in his opinions, still I would consider him very rational.

Q. Did he conduct himself properly or improperly?

A. Properly on those occasions that I saw him.

Q. Did he appear to be a well-educated man or not?

A. Yes.

Q. What have you to say about his mentality, either as being good or bad?

A. I thought it was very good.

Q. Other than being high-strung, would you say that there was anything in your opinion that would convey to you as a doctor, knowing him as you did both from your examination and your personal contact, that he was suffering from any mental or physical disorder?

A. I would not think so.

Mr. LAFARGUE. I ask that the notary, identify, for the
470 purpose of identification only, the three documents marked
Kerlin 1, Kerlin 2, and Kerlin 3.

(The documents will be marked by the notary and attached to this deposition.)

(Witness tendered.)

Cross-examination by Mr. SMITH:

Q. Doctor, did you make a neuropsychiatric examination of Mr. Witbeck?

A. No; I did not.

Q. You didn't make any findings at all in your examination as to his mental condition?
471

A. No.

475 Redirect examination by Mr. LAFARGUE:

Q. Doctor, in your opinion from your physical examination, as well as your personal acquaintanceship with Mr. Witbeck, was there anything either from his mental or physical condition that would interfere with or prevent him from pursuing his profession?

A. I don't think so.

Q. You knew that he was a civil engineer?

A. Yes.

Q. Can you think of anything in that regard that would prevent him from going on with his ordinary duties and performing

same just as other civil engineers would be required to in his profession?

A. I don't know of anything.

484 | (Filed Mar. 29, 1939. Charles E. Stewart, Clerk.)

[Endorsement on cover:] No. 7543. United States of America, Appellant vs. Ella Tyler Witbeck, Beneficiary, &c. United States Court of Appeals for the District of Columbia. Filed Nov. 1, 1939. Joseph W. Stewart, Clerk.

No. 7543

**In the United States Court of Appeals for the
District of Columbia**

JANUARY TERM, 1940

UNITED STATES OF AMERICA, APPELLANT

v.

ELLA TYLER WITBECK, BENEFICIARY OF ALBERT TYLER
WITBECK, DECEASED, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

DAVID A. PINE,
United States Attorney.

ALLEN CRENSHAW,
Attorney, Department of Justice.

JAMES B. COSTELLO,
Attorney, Department of Justice.

JULIUS C. MARTIN,
Director, Bureau of War Risk Litigation

WILBUR C. PICKETT,
Special Assistant to the Attorney General.

FENDALL MARBURY,
Special Attorney, Department of Justice.

INDEX

	Page
Jurisdictional statement.....	1
Statement of the case.....	2
Summary of the evidence.....	3
Statutes involved.....	17
Statement of points relied on.....	17
Summary of argument.....	18
Argument:	
The evidence was insufficient in law to justify a finding that Witbeck was totally and permanently disabled within the meaning of his insurance policies on January 13, 1933.....	19
The trial court erred in admitting the deposition and report of Dr. Butler insofar as they contained or were based in whole or in part upon statements made to him by other persons....	22
The trial court erred in refusing to admit in evidence the part of Dr. Kerlin's deposition and exhibits attached thereto relating to Witbeck's mental condition at the time of his examination in October 1933.....	23
Conclusion	23

CITATIONS

Cases:

<i>Eggen v. United States</i> , 58 F. (2d) 616.....	22
<i>Falbo v. United States</i> , 64 F. (2d) 948, affirmed per curiam, 291 U. S. 646.....	19
<i>Penna. R. Co. v. Chamberlain</i> , 288 U. S. 333.....	19
<i>Third National Bank & Trust Co. v. United States</i> , 53 F. (2d) 599.....	23
<i>United States v. Balance</i> , 61 App. D. C., 59 F. (2d) 1040.....	23
<i>United States v. Hill</i> , 62 F. (2d) 1022.....	22
<i>United States v. Howard</i> , 64 F. (2d) 533.....	22
<i>United States v. Owen</i> , 71 F. (2d) 360.....	22
<i>United States v. Spaulding</i> , 293 U. S. 498, rehearing denied, 294 U. S. 731.....	22
<i>United States v. Wilson</i> , 50 F. (2d) 1063.....	23

Statutes:

Title 9, Sec. 20 of the District of Columbia Code.

(I)

SUPPLEMENTAL INDEX TO RECORD

PLAINTIFF'S WITNESSES

	Dep.	D. E.	C. E.	R. D. E.	R. C. E.
Judge W. C. Barnette.....	63	141	147	150	-----
Mrs. M. C. Blane.....	71, 84	173	-----	-----	-----
Dr. Willis P. Butler.....	64	151	159	164	-----
Dr. Ray F. Guynn.....	-----	72	74	-----	-----
Mrs. Carrie M. Henry.....	84	181	185	186	187
Mrs. Ella C. Levy.....	84	174	179	-----	-----
Lucy C. Matthews.....	71	165	171	173	-----
John M. Sandlin.....	-----	38	40	48	-----
Ella T. Witbeck.....	-----	12	15	31	-----
William Witbeck.....	-----	49	52	¹ 121	122

DEFENDANT'S WITNESSES

Wallace D. Brock.....	-----	100	103	-----	-----
E. Wayles Browne.....	93	200	203	208	209
Dr. Raymond K. Foxwell.....	-----	94	96	-----	-----
Dr. J. M. Gorton.....	92	187	193	198	199
John E. Heard.....	97	217	-----	-----	-----
Dr. W. S. Kerlin.....	104, 111	239	243	-----	-----
F. E. Lacaze.....	96	209	211	-----	-----
Mrs. John Marshall.....	98	238	-----	-----	-----
R. O. Roy.....	97	212	216	-----	-----

PLAINTIFF'S EXHIBITS

	Page
No. 1—Contract.....	32
No. 2—Contract.....	32
No. 3—Picture.....	84
No. 4—Death certificate.....	85, 112
Examination report, January 24, 1929, Diagnostic Center, Washington, D. C.....	34, 87
Examination report, Dr. Foxwell, February 20, 1929.....	36
Medical summary, February 25, 1929.....	37
Examination report, August 24, 1933, Dr. Gorton.....	98
Record of hospitalization.....	38
Retirement benefits.....	123

¹ Recalled.

III

DEFENDANT'S EXHIBITS

No. 1—Withdrawn.....	
No. 2—May 2, 1929, Change of Beneficiary.....	25
No. 3—April 16, 1936, Form 579, claim for insurance benefits.....	28, 115
No. 4—July 6, 1928, Application for retirement pay.....	28, 116
No. 5—November 2, 1933, Appeal to Administrator Vet- erans' Affairs.....	28, 115, 116
No. 6—December 1, 1928, Employment statement.....	28
Nos. 7-23—June 28, 1927—May 31, 1932, applications for reinstatement.....	29, 114
No. 24—May 27, 1933, Letter from Witbeck to Adminis- trator, Veterans' Affairs.....	30, 114, 119
No. 25—March 2, 1925, Letter from Witbeck to Regional Manager.....	30, 112, 113
No. 26—February 7, 1930, Witbeck's claim for hospital pay, to Bureau, New Orleans.....	30, 113
No. 27—September 26, 1933, Civil Service Application.....	30, 115
No. 28—Picture.....	31
No. 29—May 2, 1931, Civil Service application.....	31, 115
No. 30—October 13, 1933, Examination Report of Dr. Kerlin.....	111
Nos. 32-35—March 7, 1929—May 27, 1931, Witbeck's correspondence with editor of Biographical Dictionary.....	101-102, 116-119
Examination Report, June 26, 1925.....	86
Examination Report, June 25, 1925.....	87
Examination Report, November 28, 1928.....	87
Examination Report, February 8, 1929.....	87
Examination Report, February 14, 1929.....	88
Reports of Decisions of Supreme Court of Louisiana.....	88
Witbeck's testimony in the case of <i>A. J. Broderick and George Calvert v. Sabine Lumber Company</i>	99-100, 222-237

In the United States Court of Appeals for the District of Columbia

JANUARY TERM, 1940

No. 7543

UNITED STATES OF AMERICA, APPELLANT

v.

ELLA TYLER WITBECK, BENEFICIARY OF ALBERT TYLER
WITBECK, DECEASED, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR THE APPELLANT

JURISDICTIONAL STATEMENT

This is a suit on a claim for benefits under two United States Government life (converted) insurance policies by Seymour Van Os, as administrator of the estate of the insured, Albert Tyler Witbeck, and Ella Tyler Witbeck, the beneficiary designated in the policies, alleging that the insured became totally and permanently disabled while the policies were in force and died on December 1, 1933. The date of the disability alleged in the declaration was September 1, 1932 (R. 2). The case was tried, however, on the issue as to whether the insured became totally and permanently disabled on or before January 13, 1933 (Pltff's. Instructions Nos. 4 and 7 (R. 127), Deft's. Prayer No. 15 (R. 129, charge to jury (R. 130, 132)), on which date, it was conceded by counsel for the Government, insurance was in force under both policies (R. 11). It was established by the pleadings and statements

of counsel for the Government that claims for insurance benefits were filed with the defendant on December 9, 1933, and April 23, 1936, and were denied on February 10, 1937, and that the suit was filed on April 15, 1937 (R. 1-3, 10).

Judgment in favor of the plaintiff, Ella Tyler Witbeck, was entered June 29, 1939 (R. 7-8) and a notice of appeal therefrom was filed by the defendant on July 19, 1939 (R. 8) within the time allowed by Rule No. 10 of this Court.

The respective jurisdictions of this Court and of the District Court are sustained by Section 19, World War Veterans' Act, 1924, as amended; Acts of July 3, 1930, c. 849, sec. 4, 46 Stat. 992; July 3, 1930, c. 863, secs. 1, 2, 46 Stat. 1016; June 7, 1934, c. 426, 48 Stat. 926; June 25, 1936, c. 804, 49 Stat. 1921; sec. 445, Tit. 38, U. S. C.; and Rule 73 (a) and (b) of the Rules of Civil Procedure.

STATEMENT OF THE CASE

The case was tried to a jury (R. 9). At the close of the plaintiff's case and again at the close of all of the evidence, the defendant moved the court to direct the verdict in its favor on the ground that the evidence was insufficient to present a question for the jury. These motions were denied (R. 85-86, 124-126) and the court in its charge submitted the case to the jury, without objection, on the sole issue of whether the insured became totally and permanently disabled "by reason of impairment of mind" on or before January 13, 1933 (R. 132). A verdict was rendered for the plaintiff on March 31, 1939 (R. 5). On April 4, 1939, the defendant moved the court in the alternative to set aside the verdict and enter judgment in its favor or to grant a new trial (R. 6-7). The court denied the motion and entered a judgment awarding all the benefits payable under the policies to Ella Tyler Witbeck, the beneficiary, and adjudging that Seymour Van Os, the administrator of the insured's estate, was not entitled to recover (R. 7-8).

The rulings of the trial court in denying defendant's motion for a directed verdict and its motion to set aside the verdict and enter judgment in its favor present the question on appeal as to whether there was substantial evidence that Albert Tyler

Witbeck, the insured, was totally and permanently disabled "by reason of impairment of mind" on January 13, 1933. Other questions are also presented by rulings on the evidence during the course of the trial.

SUMMARY OF THE EVIDENCE

Albert Tyler Witbeck, the insured, was egotistical, arbitrary, contrary, irritable, and disposed to pry into and interfere with things which didn't concern him (R. 69, 149, 157, 165, 190, 195, 198, 201, 210, 212, 215, 234), but was well educated (R. 21) and a civil engineer by profession (R. 172, 219), had a brilliant mind (R. 21, 211) and a remarkable memory (R. 207, 211, 220), was an ardent reader (R. 23) and collector of rare books (R. 186), and was much interested in historical research (R. 216). During the World War he was a captain in the Intelligence Service (R. 27, 217) and after his discharge in February 1919 (R. 11) returned to work for the Palmer Corporation, an oil company in Shreveport, Louisiana, where he had been employed for about two years prior to his enlistment (R. 210). In 1922 the company discharged him (R. 210). He thereafter engaged in the private practice of his profession in Shreveport (R. 47) and in doing historical research (R. 211, 220), contributing two articles to a biographical dictionary, for which he was paid (R. 101). In December 1928 his wife, whom he had married in 1915 or 1916 (R. 13), left him (R. 35) and obtained a divorce (R. 200).

Witbeck was discharged by the Palmer Corporation "on account of his contrariness" and "failure to carry out orders." The other companies learned of this and "just didn't want to be bothered with him" (R. 197). However, he received employment from time to time from other sources (R. 62, 160, 180, 189, 190, 204, 213, 215, 219) and, as late as June 1932, was employed by the attorney who had represented his wife when she obtained the divorce from him in 1928, to testify in court as an expert in a case involving a tract of land (R. 200-201). Moreover, all of the witnesses who employed him to do engineering work testified that his services were satisfactory (R. 189, 201, 216) and plaintiff herself testified that he was considered an expert in his "business" (R. 21).

Witbeck was devoted to his wife and their son, and jealous of them (R. 14, 22, 27, 208) and was very much upset when his wife left him and their son went for a time to live with the plaintiff, his grandmother (R. 24, 27, 34, 52, 56, 208). He attempted repeatedly to persuade his wife to return (R. 27, 56), sought an annulment of the divorce decree (R. 90), and made frantic efforts to reach her directly and through her lawyer and her friends, whom he harassed continually (R. 184, 206). Meanwhile, there was continual controversy and litigation between them (R. 52-53, 88-92), including a contempt proceeding against him for taking his son out of the state (R. 90-92, 201), criminal charges against him for contributing to the child's delinquency (R. 146), and proceedings instigated by his wife to have him declared insane (R. 151-152). Finally, she left town in September 1933 and remarried (R. 27) and he died about two months later, on December 1, following an operation for appendicitis (R. 85, 112, 189).

W. C. Barnette, Judge of the Juvenile Court at Shreveport, deposed as a witness for the plaintiff (R. 141) that he first knew of Witbeck probably in 1920, but paid no attention to him until he began his litigation with his wife (R. 142); that he did not regard Witbeck as balanced at any time after he first began to come in contact with him; that he "seemed to be smart in some respects, that is, he had book knowledge" but that the witness "did not feel that he was a normal person mentally" (R. 147); that he did not think there was "any doubt as to some degree of unbalance as to Witbeck's mind over a rather substantial period." but, to what extent, he would not "venture to give an opinion" (R. 144); that in 1922 or 1923 he had talked with him several times in connection with passing on the legality of a transaction involving land which Witbeck had surveyed for the witness' client and "did not form any impression concerning Mr. Witbeck one way or the other on those occasions" (R. 149); that on one occasion in 1926 or 1927, when the witness contemplated purchasing some land, he found a survey made by Witbeck of certain nearby lots which he regarded as failing to show properly the exact location of the lines; that his discussions with Witbeck concerning the matter were unsatisfactory (R. 145, 148); that he was

dominating, unreasonable, and highly nervous, and when he last came to the witness' office acted as though he had "fooled with" him "long enough" (R. 148); that during the years 1930 to 1933, Witbeck was probably capable of testifying as an expert where it involved a theory of his profession, and did so insofar as the witness knew, but that he doubted he would be accurate if he undertook to make a practical application (R. 150).

This witness further deposed that about August 25, 1933, he issued a warrant for Witbeck's arrest in connection with a charge growing out of his controversy with his wife of contributing to the general delinquency of their child; that some days afterward Witbeck was released on bond, and within two or three weeks after his arrest rushed into the witness' office "as though he was a mad man" and stated that he wanted to know why he could not get a trial; that he talked about his domestic troubles to anybody who would listen (R. 143), and made derogatory statements about the judges of the District Court (R. 146); that the charge was dropped after Mrs. Witbeck moved out of town and married again (R. 144).

John N. Sandlin, a former member of Congress, testified that he had known Witbeck for ten or twelve years prior to his death, had represented him before the Veterans' Bureau (R. 38-39), and discussed his domestic troubles with him (R. 43); that he thought Witbeck "was crazy in some ways," although not in others; that he was "very abnormal about a lot of things," and "very unreasonable" (R. 48); that he disagreed violently with the witness' suggestions as to how his claim should be presented to the Veterans' Bureau (R. 39-40), but behaved in a reasonable manner before the board (R. 45); that he was intelligent, well dressed, and a fine looking man (R. 47), but that the witness thought he was unreasonable in his attitude toward his wife and other people in Shreveport because of what the witness heard from other persons (R. 39, 41, 43, 47).

Four friends of the insured's wife deposed as witnesses for the plaintiff that they regarded the insured's conduct as irrational or insane on several occasions during the summer and fall of 1932 (R. 170, 174, 177, 184). One of them

stated that he was intensely nervous, restless, and suspicious of every one; that he accused her of breaking up his home (R. 168), left threatening letters on her porch (R. 166) and, in the spring of 1933 tried to secure his former wife's address from her by tricks and threats (R. 166, 168); that he was unstable, erratic, and would go off on tangents; that on many occasions he "most certainly was insane"; that twice he drove up hurriedly in his car and stopped by the car in which the witness was waiting for Mrs. Witbeck and said "bad words," later sending his son around to call his mother "dreadful names" (R. 170, 171); that he was, however, capable of writing a book "on some subjects" (R. 72). Two of these witnesses deposed that on several occasions, over a period of three years, Witbeck came to their house and forced his way in when one of them answered the door bell; that he had a "wild, staring look" and insisted on seeing one of them through whom he wanted to reach his wife; that he would talk to the witness on the phone for thirty minutes at a time and, even after his former wife had remarried, talked wildly about her coming back, and announced that he "was going to separate them"; that on one occasion in 1932 the air was let out of the tire of Mrs. Witbeck's car in front of a church, and that Witbeck drove around nearby until the police followed Mrs. Witbeck home (R. 176-177); that on one occasion in 1933 the witness went to Witbeck's apartment at the request of his former wife, to see whether the child was ill, as had been represented by Witbeck, and found that he only had a little fever; that Witbeck on this occasion was extremely untidy in his appearance and "acted like an insane man" (R. 177); that his conversation was never on one subject, that it was "just wild" and that he was "always threatening people with a curse and things like that" but that he always had respect for the witness (R. 178). The last of these witnesses testified that she had known Witbeck for possibly ten or twelve years (R. 181); that on one occasion he called her up excitedly and asked her to tell his wife that their son was very ill; that the witness called at his apartment and found the boy fully dressed, and Witbeck and the apartment "very untidy" (R. 182-183); that on one occasion in 1932 Witbeck came to her

door and looked at her with a stare that was "nothing but fiendish" when she refused to unlock the screen door and admit him; that his statements were erratic and contradictory; that he would have "something dreadful" to tell her about his wife but that the object of his visits was "to do something to have her be reunited with him" (R. 183); that he told his son "the most unthinkable things" about his mother, to the effect that "she stole things out of the house" (R. 183) and "was a crook"; that under his instructions the boy would ring up and make insulting remarks to the witness (R. 184); that the witness had ridden in a car driven by Witbeck; that he was not a steady driver and "you didn't feel very secure" (R. 185); that he had been an engineer but "had not done any work for a long, long time" (R. 186).

The plaintiff testified (R. 12) that in 1931 the insured, her son, drove up to her home in Troy, New York, to get his son, and stayed for the month of July (R. 13); that she had not previously noticed "anything different about him" (R. 17); that he had become careless about his appearance, occasionally wrote letters one at a time and tore them up, would "foam all over," call on the telephone and hang up before receiving an answer, call long distance and talk nonsense, and would start reading a book and throw it away; that sometimes he drove fast and erratically and always chose narrow and dangerous roads; that on one occasion he took the witness driving and stopped on a dark, narrow, mountain road, when he saw her in the back seat with her arms around his son, but drove on after she had directed him to do so; that he behaved disrespectfully to a neighbor who had come to call on the witness, and abused and petted the witness' dog by turns (R. 13-15, 22), but that he was always respectful to the witness, to whom he was devoted (R. 21), and never said anything unintelligent to her (R. 26); that he was greatly disturbed over the fact that his wife had divorced him, and that his son had been living with the witness; that he loved his wife dearly and tried to effect a reconciliation (R. 24, 27).

The insured's son testified that he lived with his father from August 1931 until his death in December 1933; that they lost their home by mortgage foreclosure in 1933 and thereafter

lived in a one-room apartment over a garage (R. 49); that they were very poor (R. 122); that his father was highly nervous most of the time; that he frequently imagined someone had entered the house at night and would wander about threatening with a long knife but "never did do anything" (R. 50); that at times he would write letters or draw maps and tear them up and tear up pictures which the witness had collected (R. 51); that once in a while his mind seemed to go blank and he would lose his temper and at times, when driving the car, "seemed to go into a fit" and drove recklessly; that he did no steady work during 1932 or 1933, would not let the witness' friends in the house, and would follow the witness suspiciously on the latter's newspaper route (R. 50-51); that he seemed to have many friends in 1931 but lost them before he died (R. 52); that he did not attend the American Legion meetings for two years before his death, and just stayed around the house most of the time, making one trip out of town to visit friends (R. 59); that he was very nervous and worried on account of the divorce, and used to write his wife seeking a reconciliation as long as he lived (R. 56); that since his death the witness has been living with the latter's mother in Washington, D. C. (R. 53).

The plaintiff offered in evidence the deposition of Dr. Willis P. Butler, of Shreveport (R. 64), and the following portion thereof was admitted without objection: That the witness was a practicing physician and held the office of "Coroner and Parish Physician"; that his duties as such included the conduct of sanity hearings and the making of reports thereon to "the proper authorities" (R. 151); that refreshing his recollection from his official records, on December 3, 1928, as a result of a conference with Witbeck's wife and a friend of hers, he asked for a warrant for Witbeck's confinement in jail for observation; that he was convinced from what Mrs. Witbeck told him that there was "something wrong in the family and there was potential danger if the situation was not remedied" (R. 152). The Government then objected to the introduction of the witness' answer to a question as to what occurred, according to the witness' recollection as refreshed by his official records, on December 3, 1928, the date of the conference, the ground of

the objection being that the answer was based on information received semiofficially from persons not under oath. The objection was overruled (R. 64). The answer objected to was to the effect that, in conference with Mrs. Witbeck and certain officials and individuals (including Dr. J. M. Gorton and R. O. Roy, whose depositions were offered in evidence in the instant case by the Government), the witness learned from them that on several occasions Witbeck had been acting in a manner "that made them feel he was mentally unbalanced or in some manner a sick man and should be observed"; that the witness "found from the history of the case that there was family trouble"; that Witbeck had been in trouble at one of the local hotels and with the police; that he had gone to one of the local schools and warned one of the teachers that his (Witbeck's) son had a violent and infectious disease; that he had made a number of threats against the lives of members of his family and his own life, having placed a pistol to his head in a threat to commit suicide, and having fired it in the house; that he bored holes through the walls and ceilings of his house to peep on his neighbors, "and in other different ways had conducted himself in a way that made us suspect that there was something wrong" (R. 152-153).

The following portion of the deposition was then admitted without objection: That the witness kept Witbeck confined in jail for ten days under examination and observation by the witness and Dr. Young, a specialist in psychiatry, whom he had called in to assist him; that they prepared a report, dated December 13, 1928, consisting of four pages, which the witness identified (R. 153-154). The Government objected to the introduction of the report on the ground that it was based upon hearsay from persons, including Witbeck's wife, who was engaged in litigation with him at the time and hence was interested in having him confined. The objection was overruled (R. 65) and the first page of the report was then read to the jury (R. 66).

This page was signed by the witness and Dr. Young and contained an opinion that Witbeck was "not insane" but that his case "would" be diagnosed as "Constitutional Inferiority with emotional instability and compensatory reactions as a

result. A bilateral sinus infection and also some evidence of a beginning organic change in the central nervous system as evidenced by the positive Babinski;" that his physical troubles should have careful attention, and that he should be in the care of a competent neuropsychiatrist in order that he "might have the benefit of treatment for the condition mentioned in the report attached hereto." It was further recommended that he should not return to his recent environment until he could be psychoanalyzed; that the signers of the report did not wish to be responsible "for what he might do should he continue to have these violent attacks of temper"; that they believed that treatment in a Government institution for ex-service men would be of advantage to him.

Counsel for the plaintiff then stated that he was only offering the first page of the report (R. 66). Counsel for the Government objected to the offer as so limited. The court ruled that the first page could not be offered without the rest of the report. The entire report was then offered and admitted over the further objection of counsel for the Government to "the whole thing" (R. 67).

The second and third pages of the report consisted of a certificate of Dr. Young of an examination made by him of Witbeck at the request of the witness, Dr. Butler, and recited a complaint of Witbeck's wife that he had been brutal and had struck her several times, had placed a gun to his head and threatened to commit suicide when their child was present, had bored several large holes in the roof so that he could spy on the people in the apartments next door; had spied on a couple who had rooms in their house several years previously; was precocious sexually; had told his child that his mother was not a good woman; and had neglected his business to engage in historical research. The certificate also contained findings of a mental examination to the effect in part that Witbeck was pleasant and anxious to make a good impression, had a good memory, was well oriented, had anxiety trends with respect to his professional work as to failure and financial success," his physical condition, and with respect to fear of harm from relatives of a man to whom he refused a discharge in the army; had no hallucinations or delusions but

"rather a delusional trend," an ego "rather marked" and, with respect to insight, had stated there was something wrong and he wanted to know what it was. The certificate also contained the notation: "Superficial reflexes: Babinski positive on right." The findings in other respects were normal. The diagnosis was identical with that on the first page. Under "Remarks" it was stated, in effect, that the investigation by the coroner and the sheriff's office had assisted very much in coming to a diagnosis. Under the heading of "Precipitating Factors" it was stated, in effect, that Witbeck's condition was influenced by financial worries regarding his inability to get work in his present profession, social maladjustment at home, worry regarding his child, and sinus infection (R. 68-70). The last page of the report consisted of laboratory tests which were negative in effect (R. 70).

The remainder of the witness' deposition was to the effect that Witbeck was a man of "marked intellectual and educational attainments" (R. 157), of "marked ability" (R. 155), ambitious in his profession (R. 157), "could probably write almost brilliantly upon some subjects" (R. 161), and had "quite a collection of very valuable books," of which he was very proud (R. 163), but that he was "markedly suspicious" of his family, business associates, and neighbors, and abnormally curious about other people's affairs; that he objected to his wife having full custody of the boy, who was then thirteen years of age, because he would not be in a proper environment, and Witbeck would be deprived of "certain fatherly privileges" (R. 157); that he could probably testify as an expert engineer "very efficiently at times, but if it were too prolonged," the witness "would think that there would probably be a break somewhere" (R. 162); that he was very unstable (R. 155) and the witness thought that his mental condition "interfered with his doing any work of any dependability" (R. 159); that he "could not pursue any one line of thought or activity on to a rational or reasonable conclusion" (R. 155) and was not the sort of man who would be willing to work under the **direction** of some one else or to do the manual labor required in farming for himself, although it would have helped him if he could have "gotten his mind on something and kept it there" (R.

163). With respect to the diagnosis as to Witbeck's mental condition contained in the witness' report, he deposed that persons with "constitutional psychiatric inferiority" are not insane but are "practically always in conflict with society" or "the law"; that "compensatory reactions" meant earnest efforts at times to overcome emotional instability by a show of spirit or ability which he did not possess (R. 158); that the "positive Babinski" referred to "a certain reflex or nervous jerk" and indicated some organic deterioration of the central nervous system; that such deterioration is not necessarily progressive and permanent, but that the witness thought it was in Witbeck's case (R. 158-159); that, subsequent to the witness' report, Witbeck was placed in a Government hospital in Washington for further observation and treatment but that the witness did not think his condition had improved on his return; that he saw him infrequently and at irregular intervals thereafter, but considered his condition to be progressively worse (R. 156) and as time went on he became convinced that it was permanent because Witbeck claimed that a needle had been broken off in his back during the taking of a spinal puncture, while he was in the witness' custody, and had been removed by a doctor in Washington, but that the witness talked to the doctor and nurse and examined the records in the hospital where the puncture was made, and found no basis for the claim; that, furthermore, Witbeck more than once expressed an intention to straighten out his family troubles but failed to do so (R. 151, 154, 155, 156, 161).

The records of the Veterans Hospital in Washington where Witbeck was a patient from January 22 to April 16, 1929 (R. 38), showed "no Babinski" or other evidence of mental deterioration, and a diagnosis of "Psychoneurosis, psychasthenia, moderate," based apparently on worry and depression on account of his failure to adequately support his family and the breaking up of his home (R. 34, 36-37, 87). Dr. Raymond K. Foxwell, who made this diagnosis, testified as a witness for the Government that this condition would have very little effect on Witbecks' ability to engage in an occupation, and that work would be good for him (R. 95).

Dr. Ray F. Guynn, a neuropsychiatric specialist, who had not examined Witbeck, testified, as a witness for the plaintiff, that psychoneurosis is a functional nervous disorder indicated by excitability, depression, and inability of the patient to "stick to any job continuously;" that psychasthenia is the worst form of psychoneurosis and is characterized by obsessions and fears (R. 73), but that it "yields partly to treatment" and that these conditions do not disable all persons in the same way (R. 74) and do not constitute insanity (R. 75); that psychasthenia indicates at least a moderate degree of disability; that whether psychopathic inferiority was disabling to a major degree would depend upon the individual case (R. 76); that constitutional psychopathic persons are infrequently incompetent (R. 75); that a positive Babinski would perhaps induce the opinion that there was some organic condition of the nervous system (R. 72); that a "beginning organic change" in the system indicates that some physical disease is attacking it which probably might increase and which is a disabling condition, both physically and mentally (R. 73), but that the condition might change and result in a negative reaction to the Babinski test (R. 81), which consists merely in stroking the bottom of the foot, there being a positive reaction if the toes are extended and a negative reaction if they curl up (R. 82).

The depositions of five witnesses for the defendant, four of whom, including Witbeck's family physician, deposed that they had known him since 1923 or earlier, were to the effect that Witbeck was eccentric, egotistical, contrary, irritable, and suspicious (R. 190, 195, 197-198, 201, 210-212, 215, 220), but was not insane (R. 192, 202, 204, 210-212, 215); that he had a mind which was brilliant (R. 211) or at least extraordinary in some respects (R. 202) and a remarkable memory (R. 207, 211, 220); that he was a competent engineer (R. 216) whose work "always stood up" (R. 190) and was very much interested in history and devoted a great deal of time to historical research, and collecting rare books (R. 190, 201, 211); that he had been employed at times to testify as an expert engineer in law suits (R. 215) and for other professional work (R. 204.

219), and that three of the witnesses had themselves employed him for such work (R. 189, 201, 213).

One of these witnesses, R. O. Roy, who was engaged in the land lease and royalty business (R. 212) deposed that he had employed Witbeck professionally on many occasions until 1929, when Witbeck violated his instructions in connection with a non-professional matter for which he had been employed (R. 213-214). The witness deposed that he was always satisfied with his engineering work (R. 216).

E. Wayles Browne, another one of the witnesses mentioned above, who was attorney for Witbeck's wife at the time of her divorce, deposed that he had employed Witbeck to testify as an expert engineer in a case which the witness won in the lower court on June 3, 1932 (R. 93, 201). Witbeck's testimony in that case (admitted in evidence in the instant case (R. 99, 100, 223-237)) shows that he was subjected to a lengthy and vigorous cross-examination (R. 224-237). Browne deposed that his testimony was helpful in winning the case (R. 201), and John E. Heard, another witness for the defendant, who was a civil engineer (R. 218), deposed that the portion of the testimony which he had heard was satisfactory and in accord with good engineering principles (R. 221).

Dr. J. M. Gorton, a friend of Witbeck's and his family physician (R. 188), deposed in part that he examined him in August 1933 and found chronic bronchitis (R. 188); that he noticed no change in his personality during the latter years of his life (R. 195-196); that he had employed Witbeck professionally in 1925 and had every confidence in his engineering ability (R. 189-190), and that he was capable of working efficiently until the date of his death (R. 192-193).

The deposition of Wallace D. Brock, an official of a Learned Society, introduced in evidence by the defendant, was to the effect that Witbeck contributed two articles to a biographical dictionary in May and September 1929, for which he received payment (R. 100-103). He corresponded with the editors of the Dictionary until May 27, 1939, concerning them (Deft's. Exs. 32-35 (R. 116-119)).

The defendant also offered in evidence the deposition of Dr. W. S. Kerlin (R. 104, 239), which was to the effect that

he had first met Witbeck in 1920 at an American Legion meeting, and had seen him often on the streets or at Legion meetings until 1923, when the witness moved out from the downtown section; that the witness did not attend the meetings regularly after 1931 or 1932; that he examined Witbeck on October 4, 1933, for Government disability insurance; that he complained at that time of chronic bronchitis alleged to have resulted from gas poisoning and "substernal pain" (R. 241); that the witness' findings were essentially negative; that Witbeck's "physical and mental appearance" was "very good"; that the witness would say he was "normal, he was high-strung," and did not recall that he "ever" showed symptoms of any mental disorder; that Witbeck took part in the proceedings at Legion meetings quite often, was always rather aggressive and constructive in his suggestions and criticisms, and was very intelligent (R. 242); that the witness considered him "very rational," well educated, and well behaved, but rather decided in his opinions. On cross-examination the witness deposed that he did not make a neuropsychiatric examination of Witbeck, and made no findings in his examination as to his mental condition, and, on redirect examination, that from his examination and his acquaintance with Witbeck, he did not think there was anything with respect to his mental or physical condition that would interfere with his pursuit of his profession as a civil engineer (R. 243). The witness identified his signature (R. 241) on three papers concerning the examination which were taken from the files of the Veterans' Administration and are attached to his deposition. The first paper in point of time is a letter dated October 13, 1933, from the witness to Witbeck, containing a memorandum of the examination which suggested the existence of a heart ailment (R. 111).¹ The second paper is a sworn statement to a field examiner of the Veterans' Bureau, made on December 20, 1933, to the effect that the findings on the examination in October 1933 had been essentially negative. The third paper is another sworn statement to a field examiner dated December 11,

¹ The other papers are omitted from the record but are attached to the original deposition which was transmitted as part thereof (R. 135).

1937, to the effect that the examination in question had been made for Witbeck's physician, Dr. Gorton, and that Witbeck seemed to be normal mentally.

The plaintiff objected to all portions of the depositions and exhibits which related to facts obtained by the witness in his capacity as physician, and to all of his opinions based on such facts (R. 104), invoking the privilege provided in Section 1073 of the District of Columbia Code (R. 106), and waived the cross-examination of the witness (R. 110). The court admitted the letter, dated October 13, 1933, from the witness to Witbeck, on the ground that the privilege was waived with respect to it when it was submitted by him to the Veterans' Bureau (R. 106, 108) and also admitted the part of the deposition based exclusively on the witness' contact with Witbeck at Legion meetings (R. 109-110). The court, however, sustained the objection to such parts of the deposition and exhibits as "directly or by implication" were based on information received by the witness at the examination (R. 105).

It appeared by the exhibits offered in evidence by the defendant that Witbeck permitted his insurance to lapse, and reinstated it seventeen times from June 28, 1929, to May 31, 1932 (Deft's. Ex. 7, R. 29, 114); that he had been receiving retirement pay from the Government which, from July 1, 1932, to March 31, 1933, amounted to \$151.25 per month; that as of July 1, 1933, it was reduced to \$9.00 (R. 123); that on May 27, 1933, he wrote a well-expressed and courteous letter to the Administrator of Veterans' Affairs, protesting the rating which deprived him of the pay, and stating: "The mental trouble that I had, notwithstanding the doctors' diagnosis, I have worked out of and now no longer have" (Deft's. Ex. 24, R. 114, 119-120); that on November 2, 1933, he filed a formal appeal in writing from the rating, in which he set forth in detail the reasons for his contention that the rating was erroneous (Deft's. Ex. 5, R. 115, 116); that on May 2, 1931, and again on September 26, 1933, he filled out Civil Service applications containing statements that he had been employed on numerous engineering projects until 1931, earning \$10,000 per year, on an average, and that since 1931 he had earned \$3,500 per year (Deft's. Exs. 27 and 29, R. 115).

Physical and mental examinations made of Witbeck by Government doctors in June 1925 and November 1928 were negative (R. 86-87).

STATUTES INVOLVED

Title 9, Section 20, of the District of Columbia Code provides:

Testimony of Physicians.—In the courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representative to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity, whether such information shall have been obtained from the patient or from his family or from the person or persons in charge of him: *Provided*, That this section shall not apply to evidence in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon, a human being, and the disclosure shall be required in the interests of public justice.

STATEMENT OF POINTS RELIED ON

The appellant intends to rely on the following points on this appeal:

1. That the District Court erred in refusing to grant defendant's motion for a directed verdict and its motion to set aside the verdict and enter judgment in its favor on the ground that the evidence was insufficient in law to present a question for the jury.

2. The District Court erred in admitting, over the defendant's objection, the portions of the deposition and report of Dr. Willis P. Butler, insofar as they contained or were based in whole or in part upon statements made to him, by other persons.

3. The District Court erred in refusing to admit in evidence, on the ground of privilege, certain portions of the deposition of the defendant's witness, Dr. W. S. Kerlin, and certain exhibits attached thereto, which were based on the witness' examination of Witbeck on October 4, 1933.

SUMMARY OF THE ARGUMENT

1. The evidence was insufficient in law to justify a finding that Witbeck was totally and permanently disabled within the meaning of his insurance policies on January 13, 1933. It is submitted that the evidence tended to prove at most that there were defects in his personality which were only partially disabling. There was no substantial evidence that he was insane and no substantial dispute in any of the evidence that he was a competent civil engineer, and it is obvious that the defects in his personality would not have rendered him unemployable to do engineering work not involving much contact with other people. Moreover, he was employed to do such work at least as late as June 1932. Furthermore, other gainful occupations of a more or less solitary nature were obviously open to a man of his educational and intellectual qualifications and experience in historical research.

But even if it were to be assumed that the evidence was sufficient to show that Witbeck was totally disabled on the date in question, there is no evidence justifying an inference that such disability was permanent. The abnormalities in his conduct at that time were no doubt due to his troubles with his former wife, and the fact that she moved away and remarried shortly prior to his death precludes an inference that this condition would not have eventually subsided if he had lived longer.

The opinion expressed by Dr. Butler with respect to the insured's condition and ability to work lacks adequate foundation and is hence without probative value.

2. The trial court erred in admitting the deposition and report of Dr. Butler insofar as they contained or were based in whole or in part upon statements made to him by other persons. Such statements were plainly hearsay and lacked any guarantee of trustworthiness. Moreover, there was no showing that the persons who made them were not available as witnesses.

3. The trial court erred in refusing to admit in evidence the part of Dr. Kerlin's deposition and exhibits attached thereto

relating to Witbeck's mental condition at the time of his examination in October 1933. The information contained therein was not privileged. The doctor made only a physical examination. His testimony concerning Witbeck's mental condition was based solely upon casual observation and not upon information necessary to enable him to act in his professional capacity.

Furthermore, if privilege existed, it was waived when Witbeck submitted the witness' report of the examination to the Veterans' Administration.

ARGUMENT

The evidence was insufficient in law to justify a finding that Witbeck was totally and permanently disabled within the meaning of his insurance policies on January 13, 1933

It is well settled that evidence may not be regarded as sufficient in law to meet the burden of proof imposed on a plaintiff, where it merely permits a possible inference of the facts essential to his case. The existence of such facts must be at least probable. *Penna. R. Co. v. Chamberlain*, 288 U. S. 333, 343; *Falbo v. United States*, 64 F. (2d) 948 (C. C. A. 9), *affirmed per curiam*, 291 U. S. 646. The burden was on the plaintiff in the instant case to prove that Witbeck was totally and permanently disabled within the meaning of his policies, which defined such disability as:

* * * any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

It is submitted that the evidence tended to prove at most that there were defects in Witbeck's personality which, though interfering to some extent with his following a substantially gainful occupation, were only partially disabling in that respect.

There was no evidence of any substance whatever that Witbeck was insane on the date in question. The medical witnesses for both the plaintiff and the defendant agreed, in effect, that he was not insane at any time (R. 66, 75, 192, 242). Moreover, Dr. Gorton had examined him in August 1933 and Dr. Kerlin in October of that year. Furthermore, it is obvious that Witbeck's letter to the Administrator of Veterans' Affairs in May 1933 (R. 119-120), and his written appeal to the Administrator in October of that year (R. 116), could not have been products of a disordered mind. Indeed, Witbeck himself stated in the letter to the Administrator that he had "worked out of" and no longer had the "seeming mental trouble."

The testimony of some of the plaintiff's lay witnesses that Witbeck's conduct on several occasions in the course of his marital troubles was irrational or insane would not, we submit, justify an inference of insanity, in view of the undisputed medical evidence to the contrary, and especially since his conduct, as described by those witnesses, was at least equally consistent with the existence merely of emotional and nervous strain due to his troubles with his wife.

Moreover, there is no substantial dispute in any of the evidence that Witbeck was a competent civil engineer. The plaintiff herself testified that he was regarded as an expert in his profession (R. 21) and this was corroborated by three other witnesses who had employed him in his professional capacity (R. 190, 216, 221). The doubt expressed by Judge W. C. Barnette of the Juvenile Court as to Witbeck's accuracy in making a practical application of engineering principles was apparently based solely on one of Witbeck's surveys concerning which he and the witness had disagreed. The witness stated in effect, however, that he had found no fault with other work done by Witbeck which he had examined on prior occasions (R. 149), and conceded that he was probably capable of testifying as an expert on the theory of his profession (R. 150). In view of Witbeck's professional knowledge and skill, it is obvious that the defects in his personality would not

have rendered him unemployable to make surveys or do other engineering work not involving much contact with other people. Moreover, the evidence shows that he received such employment from time to time until at least as late as June 1932, less than six months prior to the date on which he is alleged to have become totally and permanently disabled, when he testified as an expert and assisted materially in winning the case in the lower court for his employer (R. 201, 222-237). Furthermore, he would doubtless have been more successful in his profession if he had moved away from Shreveport after his discharge from the Palmer Corporation, which gave him a bad name with other oil company officials in that locality.

Moreover, other gainful occupations of a more or less solitary nature were obviously open to a man of his educational and intellectual qualifications and experience in historical research.

But even if it were to be assumed that the evidence was sufficient to show that Witbeck was totally disabled within the meaning of his policies on the date in question, we submit that there is no evidence which would have justified an inference that the conditions upon which such disability were founded rendered it reasonably certain that it would continue throughout his life. The abnormalities of conduct at that time, described by the plaintiff and some of her witnesses, were no doubt due to nervous and emotional strain induced by his troubles with his former wife, to whom he was still very much devoted, and the fact that she moved away and remarried only two months prior to his death precludes an inference, in the absence of speculation, that this condition would not have eventually subsided if he had lived longer. While it is true that Dr. Butler expressed the opinion that Witbeck had become permanently unable to do reliable work, this opinion was, we submit, entirely without adequate foundation. The witness admitted that he had very little contact with the insured after the examination in connection with the inquiry conducted by the witness into his mental condition, and stated,

in effect, that he based his opinion entirely upon that examination, Witbeck's subsequent claim that a needle had been broken off in his back during the taking of a spinal puncture, and the fact that he was unsuccessful in adjusting his marital difficulties. The diagnosis made by the witness and Dr. Young was based, in substantial part at least, upon information received from Witbeck's wife, which was manifestly unreliable under the circumstances, especially in view of the fact that she was not called as a witness to substantiate it, although she was living in Washington, D. C., at the time of the trial, according to the testimony of her son. Moreover, the witness, in expressing the view that Witbeck was suffering from a permanent and progressive impairment of his central nervous system, based upon the positive reaction to the Babinski test, failed to take into account the fact that the reaction to the test was negative later and that, as testified, in effect, by the plaintiff's witness, Dr. Guynn, such a change in the reaction to the test indicated that any condition existing at the time of the positive reaction had been removed. Furthermore, Dr. Butler was apparently not himself a specialist in nervous and mental diseases. We submit that his opinion was wholly lacking in probative value. Cf. *United States v. Spaulding*, 293 U. S. 498, rehearing denied, 294 U. S. 731; *United States v. Howard*, 64 F. (2d) 533 (C. C. A. 5th); *United States v. Owen*, 71 F. (2d) 360 (C. C. A. 5th); *United States v. Hill*, 62 F. (2d) 1022, 1026 (C. C. A. 8th); *Eggen v. United States*, 58 F. (2d) 616, 621 (C. C. A. 8th).

The trial court erred in admitting the deposition and report of Dr. Butler insofar as they contained or were based in whole or in part upon statements made to him by other persons

It is submitted that error was committed by the trial court in admitting the portion of Dr. Butler's deposition in which he recited the statements made to him by Mrs. Witbeck and others. The admission of such statements was, we submit, plainly a violation of the rule against hearsay evidence and

was objected to on that ground. Moreover, such statements were wholly lacking in any guarantee of trustworthiness and there was no showing whatever that the persons who made them were not available as witnesses. Furthermore, the witness' report, based in substantial part, at least, upon such statements, was also inadmissible for the same reasons and should have been rejected upon the Government's objection. Cf. *United States v. Balance*, 61 App. D. C. 226, 59 F. (2d) 1040, 1041 (App. D. C.); *Third National Bank v. United States*, 53 F. (2d) 599 (C. C. A. 6th); *United States v. Wilson*, 50 F. (2d) 1063 (C. C. A. 4th).

The trial court erred in refusing to admit in evidence the part of Dr. Kerlin's deposition and exhibits attached thereto relating to Witbeck's mental condition at the time of his examination in October 1933

It is submitted that the portions of Dr. Kerlin's deposition relating to his examination were not privileged as claimed by the plaintiff, at least insofar as they related to Witbeck's mental condition. The statute applies in terms only to information necessary to enable a physician to act in his professional capacity. Any information which he obtained as to Witbeck's mental condition at the examination was necessarily based entirely upon casual observation since he made only a physical examination. It was, therefore, we submit, wholly unnecessary to enable him to act in his professional capacity.

Furthermore, it is submitted that if the privilege existed, it was waived when Witbeck submitted the witness' report of the examination to the Veterans' Administration, where it became a public record.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed with directions to enter judgment for the defendant on the ground of error in the refusal of the court to direct a verdict for the defendant or to enter judgment in its favor notwithstanding the verdict; that if, however, this court should regard the evidence

sufficient to take the case to the jury, the judgment should nevertheless be reversed and a new trial granted on the ground of prejudicial error in rulings on the evidence.

DAVID A. PINE,

United States Attorney.

ALLEN CRENSHAW,

Attorney, Department of Justice.

JAMES B. COSTELLO,

Attorney, Department of Justice.

JULIUS C. MARTIN,

Director, Bureau of War Risk Litigation.

WILBUR C. PICKETT,

Special Assistant to the Attorney General.

FENDALL MARBURY,

Special Attorney, Department of Justice.

JANUARY 1940.

~~FILED~~ FEB 29 1940

Joseph W. Stewart
**United States Court of Appeals for the
District of Columbia**

JANUARY TERM, 1940

No. 7543

UNITED STATES OF AMERICA, APPELLANT,

vs.

**ELLA TYLER WITBECK, BENEFICIARY OF ALBERT TYLER
WITBECK, DECEASED, APPELLEE.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.**

BRIEF OF APPELLEE

WARREN E. MILLER,
Attorney for Appellee,
1206 Peoples Life Ins. Building,
Washington, D. C.

INDEX.

SUBJECT INDEX.

	Page
Statement of the Case	1
Summary of Argument	2
I. Abundant substantial evidence appears in the Record to sustain the Jury's verdict, in the nature of:	
(a) Medical testimony	2
(b) Government records of hospitalization.....	2
(c) Lay testimony	2
(d) The law applicable	2
II. No prejudicial error was committed in admitting testimony and report of plaintiff's witness, Dr. Willis P. Butler.....	2
(a) No error was committed.....	3
(b) If there was error, it was not prejudicial, but harmless..	16
(c) In any event, defendant has waived the right to claim error	17
III. No prejudicial error was committed in refusing to admit testimony of defendant's witness, Dr. W. S. Kerlin.....	17
Argument	3
I. Abundant substantial evidence appears in the Record to sustain the Jury's verdict.....	3
(a) Medical testimony:	
Dr. Willis P. Butler.....	3
Dr. Ray F. Gynn	5
Dr. J. M. Gorton.....	6
(b) Government Records of Hospitalization:	
(c) Lay testimony:	
William Witbeck	9
Honorable John N. Sandlin.....	10
William C. Barnett.....	10
Mrs. Lucy C. Mathews.....	11
Mrs. Marguerite Blane.....	11
Mrs. Ella C. Levy.....	11
Mrs. Carrie M. Henry.....	11
(d) Under the law applicable.....	12
II. No prejudicial error was committed in admitting testimony and report of plaintiff's witness, Dr. Willis P. Butler.....	14
III. No prejudicial error was committed in refusing to admit testimony of defendant's witness, Dr. W. S. Kerlin.....	17
Conclusion	19

CASES CITED.

Adams v. Washington & G. R. Co., 9 App. D. C. 26.....	13
American National Bank & Trust Company of Chicago, Conservator of the Estate of George Thornton Thompson. Incompetent, v. United States, 104 F. (2d) 783, (C.C.A. 7th)	13

	Page
Baltimore & P. R. Co. v. Carrington, 3 Apps. D. C. 101	13
Chesapeake R. R. Co. v. Brez, 39 Apps. D. C. 58.....	13
Ford v. United States, 44 F. (2d) 754 (C. C. A. 1st)	13
Gloria v. Washington Southern R. Co., 30 Apps. D. C. 559.....	13
Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721.....	14
Muth, et al., v. United States, 78 F. (2d), 525 (C. C. A. 4th)	13
Ricketts v. United States, 32 F. (2d) 943, 59 Apps. D. C. 47.....	18
United States v. Burgoyne, 57 F. (2d) 764, 61 Apps. D. C. 97.....	13
United States v. Flippence, 72 F. (2d) 611.....	13, 14
United States v. Fulkerson, 67 F. (2d) 288 (C. C. A. 9th)	13
United States v. Kieling, 68 F. (2d) 163 (C. C. A. 9th)	13
United States v. Klever, 93 F. (2d) 15.....	13
United States v. Stewart, 58 F. (2d) 520, 61 Apps. D. C. 115.....	13
United States v. Tyrakowski, 50 F. (2d) 766, 770.....	13
United States v. Woltman, 57 F. (2d) 418, 61 Apps. D. C. 52.....	13
Warthen v. Hammond, 5 Apps. D. C. 157.....	13
White v. United States, 270 U. S. 175, 180.....	12

MISCELLANEOUS.

3 Corpus Juris. Appeal and Error, p. 958.....	17
Jones on Civil Evidence, par. 508.....	15
Title 28, Sec. 695, U. S. C. A.....	15

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1940

No. 7543

UNITED STATES OF AMERICA, APPELLANT,

vs.

ELLA TYLER WITBECK, BENEFICIARY OF ALBERT TYLER
WITBECK, DECEASED, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

BRIEF OF APPELLEE

Statement of the Case

This is an appeal from a jury verdict (R. 5) in favor of Ella Tyler Witbeck, mother and beneficiary of Albert Tyler Witbeck, hereinafter referred to as the insured upon which judgment was entered (R. 7) granting total and permanent disability benefits under a United States government life

(converted) insurance (R. 7-8) contract from and after January 13, 1933, the insured having died on December 1, 1933 (R. 85).

From such judgment this appeal was taken upon the following grounds:

1. Refusal to grant appellant's motion for a directed verdict.

2. For admitting portion of deposition and report of plaintiff's witness, Dr. Willis P. Butler.

3. For refusing to admit certain portions of deposition of defendant's witness, Dr. W. S. Kerlin.

Summary of Argument

I. Abundant substantial evidence appears in the Record to sustain the Jury's verdict, in the nature of

(a) Medical testimony.

(b) Government records of hospitalization.

(c) Lay testimony.

(d) The law applicable.

II. No prejudicial error was committed in admitting testimony and report of plaintiff's witness, Dr. Willis P. Butler

(a) No error was committed.

(b) If there was error, it was not prejudicial, but harmless.

(c) In any event, defendant has waived the right to claim error.

III. No prejudicial error was committed in refusing to admit testimony of defendant's witness, Dr. W. S. Kerlin

Argument

I.

Abundant substantial evidence appears in the Record to sustain the Jury's verdict

The record shows that substantial evidence was introduced in support of appellee's case. Certainly no such preponderance appears on behalf of appellant as to warrant the reversal of the trial court's judgment upon that ground, as is here urged by appellant.

Plaintiff introduced the testimony of ten witnesses,

Ella Tyler Witbeck (R. 12-32).
 John N. Sandlin (R. 38-48).
 William Witbeck (R. 49-63, 121-123).
 Dr. Ray F. Guynn (R. 72-73).
 Judge W. C. Barnette (R. 141-151).
 Dr. Willis P. Butler (R. 151-165).
 Mrs. Lucy C. Mathews (R. 163-173).
 Mrs. Marguerite Carlton Blane (R. 173-174).
 Mrs. Ella C. Levy (R. 174-181).
 Mrs. Carrie M. Henry (R. 181-187).

beside certain evidence from the United States Veterans' Administration official records in the nature of reports of physical examinations made of the insured by appellant's physicians at government hospitals (R. 34-37) and report of hospitalization (R. 38).

(a) Medical Testimony—Dr. Willis P. Butler

Dr. Willis P. Butler, coroner of Caddo Parish, Louisiana, for some 23 years, whose duty embraced from a medical standpoint the care of the nervous, mentally and

insane citizens who go to institutions other than jail, testified (R. 151) that on December 3, 1928 (R. 152) he requested a sanity hearing of the insured, and asked for a warrant for his confinement in jail for observation. He found something (R. 153) mentally wrong with the insured, and kept him in jail (R. 154) from December 3rd until December 13, 1928. He saw the insured on various occasions (R. 155) at which time he was incompetent and unreliable, and in this physician's opinion, permanently so. He considered the insured "*a man who could not pursue any one line of thought or activity on to a rational or reasonable conclusion.* * * * (R. 156). He would start out on this main idea but would be side tracked by something and in a short time that would then become the main issue with him." *This condition existed to such an extent that if he had had any work that he wanted carefully and accurately done he would not have given it to him, no matter what education or ability he might have had. He did not have the stability to do the work and was not dependable or reliable in carrying it out.* This witness considered his case to be progressively worse (R. 156). He was markedly suspicious (R. 157) of his associates, family and neighbors. His general attitude towards most of his friends caused them to be afraid of him. (R. 158) Constitutional psychiatric inferiority means that those persons suffering from such condition are practically always in conflict with society or probably in conflict with the law, they do not seem to adjust themselves to the normal ways of society. This witness diagnosed the insured's condition as being "*Constitutional inferiority with emotional instability and compensatory reactions.*" He was very emotional and unstable. Some changes had probably occurred in the central nervous system to make him more nervous, exhibit a more nervous reaction (R. 159). *The organic change of the central nervous system, such as was begin-*

ning in December, 1928, would be expected to result in a progressive deterioration. His condition in December, 1928, tended to have a deteriorating effect on his central nervous system, which in this case was a progressive and permanent condition (R. 159). His mental condition as this witness observed it "simply interfered with his doing any work of any dependability or doing dependably anything he started out to do." Dr. Butler testified (R. 165): "I do not think he would have been dependable or reliable for the work."

Dr. Butler testified that upon examination of (R. 158) the insured he found what he described as a positive Babinski.

Dr. Ray F. Guynn

Dr. Ray F. Guynn, a neuropsychiatrist, who received training in psychiatry at St. Elizabeths Hospital, spent several years with the United States Veterans' Administration at the Diagnostic Center here in Washington, lecturing to post-graduate classes in neurology and psychiatry (R. 72), testified that if a patient had a positive Babinski he would feel he perhaps had some organic involvement of the nervous system.

Dr. Butler testified (R. 158) as to an organic change and Dr. Guynn said (R. 73) that when there is a beginning organic change in the central nervous system he, as a physician, would conclude that the individual was suffering from some physical disease which was attacking his nervous system with the probability that it might increase; that this is a disabling condition as the nerve tracts of the nerve cells of the brain are being involved by some process, some poison, or disease that is naturally disabling from a physical and mental standpoint.

The government hospital records show that the insured was admitted January 22, 1929 "for exam. C. P. I. with

psychotic episodes, manic phase" (R. 37). Dr. Guynn testified (R. 73) that the term "psychiatric" in the phrase "psychiatric episodes" indicates a person is suffering from delusions or hallucinations. The medical word is synonymous with the word "insanity" and we mean the patient is really mentally disturbed. In the phrase "psychiatric episodes of a manic phase" the word "manic" describes the exciting phase of a mental disorder where the patient is physically hyper-active and cannot sit still or stay in one place.

The diagnosis made according to the records of the government hospital on February 20, 1929 (R. 37) shows the insured was suffering from psychoneurosis and psychasthenia. Dr. Guynn testified (R. 73): that psychoneurosis is a functional nervous disease disorder, a functional disorder of the nervous system by which there is a deviation of the personality from the normal. The patient is excitable, subject to periods of illusion, alternating with euphoria, depression, restlessness and the patient cannot continue at anything very well, any job continuously. I consider psychasthenia the worst form of psychoneurosis because it is characterized by obsessions, fears and phobias. While phobia is a (R. 74) fear, these obsessions are pretty deep in a personality. They are obsessed to do certain things. The disabling effects of these diseases or disabilities on an individual depends on the individual, his education, age, the fixation of the symptoms, his will power, character and other qualities and differs with different individuals. We believe that all psychoneurotics have an unstable nervousness.

Dr. J. M. Gorton, who testified for the defendant (R. 188), and saw the insured once or twice a year from 1923 or 1924 until his death stated that in August, 1933, insured was suffering from a chronic condition of his chest, described as chronic, diffused bronchitis with moderate emphysema.

He described the insured as "very peculiar, high strung, arbitrary and contrary" and ventured the opinion that some people would not give him a job on account of knowing him. He stated (R. 192) "I don't think I ever knew anybody like Witbeck." (R. 195) He was very suspicious of people, became irritable at times and would fly into a rage on slight provocation. (R. 198) If he would see a couple in an automobile and the boy might have his arm around the girl, hugging her, he would follow them for hours and hours, out of curiosity. He made cracks in the wall of his home so he could peep over into the house adjoining. He testified (R. 199) that the insured's chronic bronchitis from which he was suffering on August 24, 1933, was then a permanent, incurable condition.

(b) Government Records of Hospitalization

Certain government records pertaining to the insured read to the jury by counsel for plaintiff, without objection on the part of counsel for defendant, showed the following facts:

The insured was admitted to a government hospital (R. 37) January 22, 1929, for examination of "C. P. I. with psychotic episodes, manic phase," and for defective hearing and chronic bronchitis. He remained in the hospital until discharged May 16, 1929 (R. 38).

Report of physical examination (R. 34) of the insured made January 24, 1929, at a government hospital by government physicians showed the insured had difficulty sleeping because he was so worried; that usually when he goes to sleep he sleeps all right until he gets cold, then he usually stays up because he can't get warm again. Some nights he just gets about an hour or two of sleep and will get up and get something to do to occupy his mind. He noticed general weakness which he attributed to his nerves which condition

existed since the first of December, 1928, although he has been nervous ever since the war; that he worried considerably, becomes depressed occasionally (R. 35); thought everyone against him but after his wife left him in December, 1928, he began to think that probably something was wrong with him and not with everyone else. His memory was impaired, he had difficulty in concentrating, which he attributed to worrying. Sometimes he noticed a queer feeling if up high. He had a dull pain behind his right ear and (R. 36) at the back of the head all the time, which pain occasionally gets sharp. He complained of bronchitis and deafness in the right ear and extreme nervousness. The pain in the back part of his head was associated with emotional depression. He was easily excited and quite irritable at times. At the beginning he thought people were persecuting him, but on reflecting he believes something was wrong with him. He had frequent spells of depression in which he would cry for no apparent reason and he described a feeling of worked apprehension that is almost constantly present, that he feels some catastrophe will overtake him for no apparent reason. He had chronic productive cough and dyspnea on exertion. He recently has been tremendously worried about his failure to carry on and failure to make sufficient money to adequately supply the needs of his family. After prolonged effort he experienced blurring of vision. His sleep was frequently disturbed by unpleasant dreams. He feels generally weak and tires easily, and when tired is extremely irritable. He appeared (R. 37) much depressed and apprehensive, and seemed somewhat preoccupied with his own thoughts and acted like a patient did that was depressed and apprehensive. Hospitalization was recommended by the government physicians with appropriate psycho-therapy for his disability of psychoneurosis, psychasthenia.

(c) Lay Testimony

Plaintiff in this case who obtained judgment was the insured's mother, who was designated by him as beneficiary of the insurance contract upon which suit was instituted. She testified as follows: That she was a widow, 78 years of age (R. 12); when the insured last visited her in July or August, 1931, for a month she noticed (R. 13) that he didn't act like himself but began to act queer. He acted differently than before (R. 15). While theretofore (R. 13) he was always neat, yet at that time he did not care whether he was clean or not, or whether his clothing was clean. "I thought then he acted strange." (R. 14) He was not right. He (R. 26) would rather go without his clothes than wear them. He was careless and looked queer at times, wore soiled linen, but had always been very neat when in his right mind and would bathe and put on clean linen. He (R. 13) would write 15 letters, tear them up and as she expressed it he would "foam all over"; would call people on the telephone and hang up before receiving an answer; would start to read a book and then throw it on the floor. He would remain (R. 15) in the presence of a strange woman in his underclothes. In 1930 he seemed more rational than he did in 1931. On an occasion (R. 22) when riding through the woods late in the evening he acted strangely, stopped the car at a lonely place a few minutes and his eyes looked queer. His picture (R. 31) which she identified and which was introduced and shown to the jury (R. 83) disclosed a peculiar expression in his eyes.

William Witbeck, son of the insured, who lived with the insured continuously from August 1931 until his death in December, 1933, testified that (R. 49) the mortgage was foreclosed on the home and that they went to live in a one room apartment over a garage in the summer of 1933. He stated (R. 50) that every night the insured would go to

sleep with a large knife with a big blade beside his bed, would get up in the middle of the night, wake up others in the house and walk around the house with the knife, as the insured had an idea someone was in the house. He was highly nervous most of the time, would walk around and threaten. Every once in a while it seemed like his mind would go blank. He would tear up pictures when he could, have fits and rage and would drive recklessly. This witness answered the following questions as indicated (R. 50-51):

“Q. During the years 1932 and 1933—he died in December, 1933—what do you remember about any work he did?

A. None whatsoever—steady work.

Q. He did not do any steady work?

A. No, sir.

Q. What work would he do, if you remember?

A. I don't remember any at all. He talked about going to do work lots of times, but every time he got to the point of going to do it, that is all he got. Nothing ever did turn up, it seemed like.”

Honorable John N. Sandlin, who for 16 years was a member of Congress from Louisiana (R. 38) testified that he knew the insured the last few years of his life; that he was very nervous and took a very unreasonable attitude about people. He was not (R. 40) a well balanced man at all and the witness would not say he was a rational man. As time passed he did not get any better.

William C. Barnett, Judge of the Juvenile Court, Shreveport, Louisiana, 63 years of age, (R. 141) testified that he observed the insured at intervals from 1920 until he died in 1933 (R. 142). That in September 1933 the insured bolted into his office as though he were a madman, and (R. 144) acting like a crazy man. He said “I do not think there was any doubt as to some degree of unbalance as to Witbeck's mind over a rather substantial period.” The insured (R. 146) was before this Judge in 1933 for contribut-

ing to the general delinquency of his child, * * * (R. 147) "I had occasion to talk to the sheriff of this parish with regard to Witbeck because I considered him an abnormal person * * * I did not feel he was a normal person mentally," and did not regard him as a balanced man at any time after he first began to contact him. He was highly nervous (R. 148) from the time "I first met him."

Mrs. Lucy C. Mathews, housewife, age 68, testified that in the summer and fall of 1932 (R. 166) the insured left threatening letters, was suspicious of everybody (R. 168) appeared (R. 169) wild, and frantic in his demeanor, was (R. 170) very irrational, erratic and had no stability and there were many occasions when he certainly was insane.

Mrs. Marguerite Blane who testified about the insured's condition from 1931 until 1933 (R. 173), observed a wild staring look in his eyes, he was (R. 174) irrational and she was afraid.

Mrs. Ella C. Levy, housewife, age 65, testified in the summer and fall (R. 175) of 1932 his eyes were wild, and glary looking; that he would push himself against the door of her house (R. 176) and enter; that on one occasion she called police at the request of his wife, who he was following; that (R. 177) he was untidy, acted like an insane man, and she was afraid of him; and he threatened people with a curse.

Mrs. Carrie M. Henry, 61 years of age (R. 181) testified about the untidy condition of the room in which he was living (R. 182) that he looked at her with a stare that was nothing but fiendish, and made erratic and contradictory statements (R. 183); that he was (R. 184) very irrational, had a (R. 185) perverted mentality and (R. 187) was not mentally balanced.

E. Wayles Browne, an attorney (R. 200) testified for the defendant and admitted that during much of the time the insured's wife worked and earned sufficient salary to prac-

tically support the family (R. 206) earning over \$100 per month, and at times \$150 per month. The witness once represented Mrs. Witbeck but the insured made quite a nuisance of himself, which was a compensating factor in the witness not continuing to represent Mrs. Witbeck. The insured's intellect (R. 207) was quite warped compared to the ordinary. This witness testified, "generally, I would say that he was of a type the members of which did not fully orient themselves to their surroundings." He admitted the insured seemed depressed at times, the last two years of his life.

R. O. Roy, who testified for the defendant, (R. 214) stated that in 1928 he received a letter demanding money on pain of death to his daughter and employed the insured as the investigator but (R. 216) he violated his instructions and finally (R. 217) the witness thought the insured was the man that wrote the letter.

(d) The law applicable

A question of law is here presented, which calls for a consideration of the record, not for the purpose of weighing conflicting testimony, but for the purpose of determining whether there was some evidence, competent and substantial. In the consideration of such a question, it is the duty of the court to take that view of the evidence, and all the inferences that may properly be drawn therefrom, most favorable to the plaintiff, and, if the evidence is of such a character that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions, then the case should be submitted to the jury. So too, the admonition of Mr. Justice Holmes in *White v. United States*, 270 U. S. 175, 180, that the relation established between the soldier and the government is "a relation of benevolence established by the government at considerable cost to itself for the soldier's good" ought not to be forgotten, and, of

course, it is to be understood that the term "substantial evidence" is not to be used in the sense of reliability, but rather in contradistinction to the term "scintilla of evidence." *United States v. Tyrakowski*, 50 F. (2d) 766, 770. It is with these principles in mind that the question must be determined. *American National Bank and Trust Company of Chicago, Conservator of the Estate of George Thornton Thompson, Incompetent v. United States*, 104 F. (2d) 783, (C. C. A. 7th).

The Court does not weigh the evidence but considers whether there is sufficient evidence to sustain a verdict. And in war risk insurance cases the most favorable construction should be given the evidence that is produced. See *Ford v. United States*, 44 F. (2d) 754, (C. C. A. 1st).

As to war risk insurance cases where this Court has considered the question as to weight and sufficiency of the evidence, see *United States v. Stewart*, 58 F. (2d) 520, 61 Apps. D. C. 115. *U. S. v. Worlthman*, 57 F. (2d) 418, 61 Apps. D. C. 52. *U. S. v. Burgoyne*, 57 F. (2d) 764, 61 Apps. D. C. 97.

Upon the proposition of directing a verdict because of the insufficiency of the evidence to support it, attention is invited to the following cases in this jurisdiction:

- Chesapeake B. R. Co. v. Brez*, 39 Apps. D. C. 58;
- Gloria v. Washington Southern R. Co.*, 30 Apps. D. C. 559;
- Adams v. Washington & G. R. Co.*, 0 Apps. D. C. 26;
- Warthen v. Hammond*, 5 Apps. D. C. 157;
- Baltimore & P. R. Co. v. Carrington*, 3 Apps. D. C. 101.

As to war risk insurance cases see *Muth et al. v. United States*, 78 F. (2d) 525, (C. C. A. 4th); *United States v. Flippence*, 72 F. (2d), 611; *United States v. Klever*, 93 F. (2d) 15; *United States v. Fulkerson*, 67 F. (2d) 288, (C. C. A. 9th) and *United States v. Kieling*, 68 F. (2d) 163, (C. C. A. 9th).

The leading case in the Federal courts on the quantum of evidence necessary to sustain a jury's verdict is *Gunning v. Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721, in which the court said (50 S. Ct. 233) ;

“Issues that depend on the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them.”

The seventh amendment to the Constitution of the United States prohibits an examination of any fact tried to a jury otherwise than according to the rule of common law, *United States v. Flippence*, 72 F. (2d) 611.

Defendant's argument does not give to plaintiff's evidence the inferences to which it is entitled. Their argument goes to the weight of the evidence which has been resolved by the jury in appellee's favor.

It is respectfully submitted that the evidence of record, when viewed in the light of the law as above quoted, establishes the correctness of the trial court's action in this case.

No prejudicial error was committed in admitting testimony and report of Plaintiff's witness, Dr. Willis P. Butler

- (a) No error was committed.
- (b) If there was error it was not prejudicial, but harmless.
- (c) In any event appellant has waived the right to claim error.

(a) *No error was committed.*

When persons in public office are required by the nature of their office to write down particular transactions occurring in the course of their public duties and under their observation such records are generally admissible in evidence (Jones on Civil Evidence, par. 508).

Title 28, sec. 695, U. S. C. A. provides:

“In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, if it *shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum of record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.*” (Italics supplied.)

“All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to effect its weight, but they shall not affect its admissibility. The term ‘business’ shall include business, profession, occupation, and calling of every kind.” (June 20, 1936, c. 646, Par. 1, 49 Stat. 1581.)

The coroner was a public official and had certain official duties (R. 152). He observed the insured on December 3, 1928, and made an official report of these observations on December 13, 1928 (R. 65). By the nature of his office, it was necessary that he made a record of his findings which were made in the regular course of business. Therefore, it is clear that Dr. Butler’s report and testimony was properly received in evidence in view of the above quoted rule of evidence and the provisions of Title 28, Sec. 695 U. S. C. A. both quoted above. The rule of evidence quoted or the statute itself, standing alone, would be sufficient to justify the introduction of this report.

The witness's testimony was not based entirely upon his report and was properly received in evidence. Appellant urges that the opinion of Dr. Butler should be rejected because he was apparently not a specialist in nervous and mental disorders. However, it is respectfully submitted that this physician's duties as coroner, which he followed for 23 years and which involved the care of the nervous and insane (R. 151) before they were sent to institutions, sufficiently qualified him to give an opinion. None of the cases cited by counsel for appellant are in point or controlling here. No objection was made to the material portion of this witness's opinion and such testimony having been received in evidence without objection was properly before the trial court.

(b) If there was error, it was not prejudicial, but harmless

Appellant here urges a reversal of this jury's verdict based upon alleged error by the trial court in admitting a portion of a deposition pertaining to the insured's condition, December 3, 1928, over four years before the onset of the insured's total and permanent disability which the jury found occurred on January 13, 1933 (R. 7), and a report of a coroner made in the regular course of his duties. The remoteness in point of time from the date of this report, over four years before the jury in this case held the insured to have been totally and permanently disabled, certainly shows that the defendant's cause was not prejudiced by reason of something which occurred so long prior to the date the jury found the insured to have been totally and permanently disabled.

Furthermore, many of the facts to which objection is made are governed by other testimony. For instance, Dr. Gorton testified with reference to the insured making cracks in the wall of his home in order to peep into the adjoining house.

It is respectfully submitted that no error was committed. However, should it be the opinion of the Court that there was error (which is not conceded) at most this would be harmless error and was not prejudicial so as to warrant reversal of the action of the trial court.

(c) In any event appellant has waived the right to claim error

In the course of his official duties as coroner (R. 152) Dr. Butler observed the insured, Albert Tyler Witbeck, on December 3, 1928. He made an official report on December 13, 1928 (R. 65), the first page of which appears on page 66 of the record. Counsel for plaintiff (R. 67) offered only this first page of the report. Counsel for the defendant objected to the offering of only the first page of this report and insisted upon the remainder being offered (R. 67). Then, counsel for defendant objected to the whole report and the court required pages two, three and four of this report to be read (R. 68-70).

In view of the insistence of counsel for defendant at the trial of this cause that the entire report be offered defendant has waived the right to claim error in the introduction into evidence of all except the first page of this report.

Where, on a trial, a party takes a step or adopts a course directly inconsistent with an exception previously taken by him to some ruling of the trial court, he will be deemed to have waived such exception, and cannot take advantage of it upon his appeal, or writ of error. (3 Corpus Juris, Appeal and Error, p. 958.)

III.

No prejudicial error was committed in refusing to admit testimony of defendant's witness, Dr. W. S. Kerlin

Appellant seeks to have the verdict of the jury set aside upon the alleged error in the exclusion of certain testimony contained in Dr. Kerlin's deposition.

The record here, as in the case of *Ricketts v. United States*, 32 F. (2d) 943, 59 App. D. C. 47, makes it impossible to determine whether the questions and answers were relevant and material and, if so, whether their exclusion was prejudicial to the defendant's cause.

The testimony of Dr. Kerlin is set out in full in the record (R. 239-244). The ruling of the Court upon the objection of privilege under Section 1073 of the D. C. Code appears in the record (R. 104, 105) wherein the Court stated:

“ * * * I think he is an incompetent witness if he is allowed to express any opinion at all, unless it be fairly received by him in a professional capacity.
* * * I will sustain the objection to such parts as directly, or by implication, call for an opinion based on information received in confidence.”

The Court also stated (R. 111):

“Let the record show that the Court's ruling is a general one; that the Court has not read the questions and answers which have been reviewed by counsel; that it is deemed that they have agreed that the questions and answers which are excluded in the reading are such as properly come within the scope of the Court's ruling.”

The record presents no error. In ruling upon the objection to any testimony offered by the appellant, the Court's ruling was correct in view of the provisions of Section 1073 of the D. C. Code. The question attempted to be raised with reference to Dr. Kerlin's deposition should be disregarded by this Court.

Further, the record clearly indicates (R. 111) that the report of Dr. Kerlin mentioned on page 23 of appellant's brief was admitted in evidence. Hence, there is no ground for complaint by appellant with respect to this matter.

Conclusion

For the reasons stated, it is respectfully submitted there was substantial evidence to justify the jury's verdict and the trial court did not err in applying the law. Consequently, the judgment of the trial court should be affirmed.

Respectfully submitted,

WARREN E. MILLER,
Attorney for Appellee,
1206 Peoples Life Insurance Building,
Washington, D. C.

(6488)